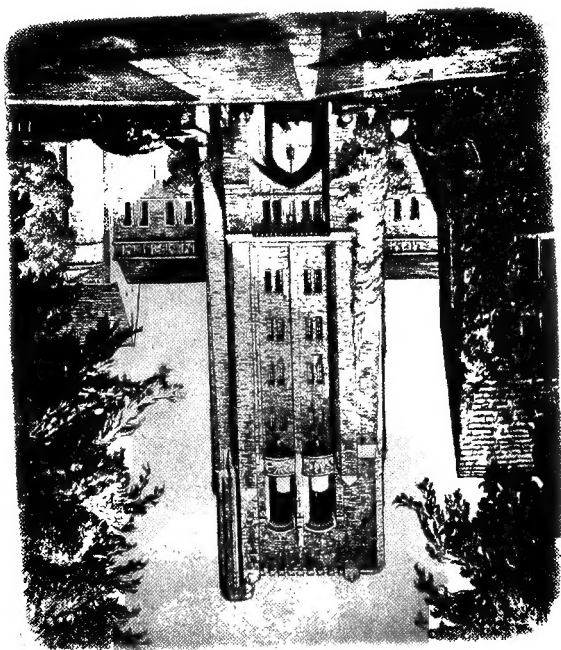




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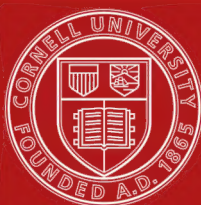
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A TREATISE  
ON THE  
LAW OF INJUNCTIONS.

BY  
JAMES L. HIGH.

THIRD EDITION.

VOLUME II.

CHICAGO:  
CALLAGHAN AND COMPANY,  
1890.

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# THE LAW OF INJUNCTIONS.

## CHAPTER XV.

### OF INJUNCTIONS FOR THE PROTECTION OF FRANCHISES.

I. NATURE AND GROUNDS OF THE RELIEF . . . . .	§ 897
II. ROADS AND RAILWAYS . . . . .	912
III. BRIDGES . . . . .	917
IV. FERRIES . . . . .	927

#### I. NATURE AND GROUNDS OF THE RELIEF.

- § 897. The general doctrine stated.
- 898. Establishing right at law.
- 899. Jurisdiction akin to that in nuisance; water company protected.
- 900. Right must be coupled with possession; negligence.
- 901. Former doctrine when grant not exclusive in terms; intendment in favor of exclusiveness.
- 902. Later doctrine averse to intendment.
- 903. Exclusive right to fishing protected.
- 904. Letters patent to maintain theatre.
- 905. Boom company.
- 906. United States courts may enjoin destruction of franchise; tax on franchise.
- 907. Fraudulent usurpation of corporate franchise.
- 908. Franchise to conduct lottery.
- 909. Written evidence of franchise, when required.
- 910. Exclusive right of navigating river.
- 911. Distinction between franchise and monopoly; gas companies.

§ 897. The violation of franchises or special privileges conferred by legislative authority, either upon individuals or upon corporations, affords frequent occasion for invoking the extraordinary aid of equity by way of injunction to remedy evils which the usual modes of redress in courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of

the inadequacy of the legal remedy and the probability of thus avoiding a multiplicity of suits. Where, therefore, the owner of the franchise is in actual possession and his title or right is not disputed, an injunction is the proper remedy for protecting him in the exercise of the exclusive privilege granted him by statute.<sup>1</sup>

§ 898. The former tendency of the English Court of Chancery seems to have been to require plaintiff to first establish his right at law, before relief by injunction would be granted for the protection of his franchise.<sup>2</sup> But in this country the rule may now be regarded as well established, that to warrant the interposition of equity for the protection of franchises it is not necessary that the owner of the franchise should have first established his right by action at law. The legislative power of the state having authority to grant the exclusive right which it is sought to protect, the granting of such right is regarded as equivalent to having established it at law.<sup>3</sup> And where defendants are in the actual possession of a franchise or privilege granted them by legislative authority, they will not be restrained in the exercise of such privilege at the suit of persons having no particular rights of their own, save a general right common to every citizen, and which it is claimed the franchise violates.<sup>4</sup>

§ 899. In a general sense the relief afforded by courts of equity against the invasion of a franchise may be regarded as akin to that which is extended in cases of nui-

<sup>1</sup> *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35; *Hartford B. Co. v. East Hartford*, 16 Conn., 149; *Enfield T. B. Co. v. Hartford & N. H. Co.*, 17 Conn., 40; *Gates v. McDaniel*, 2 Stew., 211; *Lucas v. McBlair*, 12 Gill & J., 1; *McRoberts v. Washburne*, 10 Minn., 23; *Livingston v. Ogden*, 4 Johns. Ch., 48; *In re Vanderbilt*, Ib., 57; *Ogden v. Gibbons*, Ib., 150, affirmed 17 Johns., 488; *Tyack v. Brumley*, 1 Barb. Ch., 519; S. C., 4 Edw. Ch., 258; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch., 300; *Livingston v. Van Ingen*, 9 Johns., 507; *Auburn & C. P. R. Co. v. Douglass*, 12 Barb., 553; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1.

<sup>2</sup> *Whitchurch v. Hide*, 2 Atk., 391.

<sup>3</sup> *Moor v. Veazie*, 31 Maine, 360; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35.

<sup>4</sup> *Lansing v. North River S. B. Co.*, 7 Johns. Ch., 162.

sance, and the violations of right in the two classes of cases are closely analogous. And where the legislature has conferred an exclusive privilege or franchise, and the persons accepting it have long been in the exercise and enjoyment of all the rights thereby conferred, and have performed the duties imposed, any acts which tend to disturb them in their rights and to dispossess them of their franchise are in legal contemplation a nuisance, the only safe and adequate remedy for which is by recourse to equity.<sup>1</sup> Thus, a water company, having the exclusive right or franchise of supplying water in a given locality, may enjoin a rival company from interference with such right.<sup>2</sup>

§ 900. A distinctive feature of the relief in this class of cases is that the right for whose protection the aid of equity is invoked must be coupled with possession. While, therefore, courts of equity will entertain jurisdiction to prevent any unauthorized interference with a franchise where the person seeking relief is in actual possession, yet if possession be wanting the injunction will be withheld. So he who seeks an injunction for the protection of a franchise must be free from negligence in order to entitle himself to the relief. And where he has negligently failed to perform certain conditions annexed to the granting of his franchise by the legislative power, he will not afterward be allowed to enjoin the performance of those conditions by others authorized so to do by act of legislature.<sup>3</sup>

§ 901. Not a little conflict of authority has existed upon the question whether equity may interfere by injunction for the protection of a franchise which is not made exclu-

<sup>1</sup> *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Boston Water P. Co. v. Boston & W. R. Co.*, 16 Pick., 512. The same principle is recognized in *Central B. Co. v. Lowell*, 4 Gray, 474, although the injunction was refused on other grounds.

<sup>2</sup> *Williamsport W. Co. v. Lycom-*

*ing G. & W. Co.*, 95 Pa. St., 35. As to the considerations governing the court in refusing a preliminary injunction in such case, see *Stein v. Bienville W. S. Co.*, 32 Fed. Rep., 876.

<sup>3</sup> *Enfield T. B. Co. v. Connecticut River Co.*, 7 Conn., 51.

sive in its nature by the express terms of the legislative grant, and whether any intendment or presumption may be indulged for the purpose of giving an exclusive character to the grant which the legislative power has not seen fit to specifically or expressly confer. The earlier doctrine upon this subject, which had the sanction of no less an authority than Chancellor Kent, was, that although the franchise or grant to the citizen which it was sought to protect by injunction was not in terms exclusive, yet the element of exclusiveness might be attached to it by necessary implication and that the franchise should be so construed as to give it due effect by excluding all contiguous competition of an injurious character. And in conformity with this doctrine injunctions were allowed for the protection of franchises resting in legislative grant, which by their terms were not exclusive.<sup>1</sup>

§ 902. The later and now generally received doctrine, however, is that legislative acts granting franchises to corporations are to be strictly construed in accordance with the terms of the grant, and that the grantee takes nothing by implication either as against the state, or as against other grantees of similar franchises from the state. In order, therefore, to warrant relief in equity against an invasion of or infringement upon the franchise, it must appear by the terms of the grant from the state that plaintiff is entitled to the exclusive enjoyment of the franchise in question; and unless this element of exclusiveness appears in the grant itself, it will not be imported by implication. Unless, therefore, the grant of the franchise under which plaintiff claims is exclusive in its terms, equity will not interfere by injunction to restrain the operations of persons claiming the right to exercise a similar franchise under legislative authority.<sup>2</sup> And since an exclusive franchise can

<sup>1</sup> 3 Kent's Com., 459; Croton Turnpike Co. v. Ryder, 1 John. Ch., 611; Newburgh Turnpike Co. v. Miller, 5 John. Ch., 101. But the doctrine of these cases is overruled in Auburn & Cato Plank Road Co. v. Douglass, 9 N. Y., 444.

<sup>2</sup> Charles River Bridge v. Warren



not be implied from a legislative grant, in the absence of express terms whereby it is made exclusive, it follows that a legislature may rightfully create a franchise which will conflict with one previously created, if the first were not in express terms exclusive of all others. Thus, a railway company may be incorporated to run its road through the same valley with a canal previously incorporated, but whose charter is not exclusive in terms; and if the termini of the railway are such as to require it to cross the canal, it will not be enjoined from the erection of bridges for that purpose.<sup>1</sup> And when a city grants to a street railway company the right to maintain and operate its railway in the streets, the city having no power to grant such a privilege in perpetuity to the exclusion of other companies, a rival company will not be enjoined from constructing and operating a line through the same streets.<sup>2</sup>

§ 903. An exclusive right of fishing in a river, which is derived and held under letters patent from the crown, is treated as a franchise of such a nature as to be protected in equity. And where, in such a case, plaintiff has established his right by a verdict at law, he is entitled to the aid of equity by injunction to restrain an interference with his exclusive right.<sup>3</sup>

Bridge, 11 Pet., 420, Mr. Justice Story and Mr. Justice Thompson dissenting, affirming S. C., 6 Pick., 376; *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y., 444, reversing S. C., 12 Barb., 553, and overruling *Croton Turnpike Co. v. Ryder*, 1 John. Ch., 611, and *Newburgh Turnpike Co. v. Miller*, 5 John. Ch., 101; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42; *Fall v. County of Sutter*, 21 Cal., 237; *President v. Trenton C. B. Co.*, 2 Beas., 46. But see *White's Creek Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch., 396. See also *Crawfordsville & E. T. Co. v.*

*Smith*, 89 Ind., 290. In a note to 3 Kent's Com., 459, the learned commentator concedes that the rule as contended for by him is subverted by the *Charles River Bridge* case, and admits with expressions of regret that the doctrine of the latter case is now the prevailing doctrine in American constitutional law.

<sup>1</sup> *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42.

<sup>2</sup> *Birmingham & P. M. S. R. Co. v. Birmingham S. R. Co.*, 79 Ala., 465.

<sup>3</sup> *Ashworth v. Browne*, 10 Ir. Ch., 421.

§ 904. Where under an act of parliament letters patent are issued by the crown to a citizen, authorizing him during a specified term to maintain a theatre in a city, the statute prohibiting any person from acting within the city, except in such theatre as should be so established, under a penalty to be recovered by any person who should sue for the same, it is held that the patentee, having no such right as would enable him to sue at law, and having only a right in common with others to sue for the penalty as a common informer, is not entitled to an injunction to restrain unauthorized persons from acting in a theatre for which no patent has been granted.<sup>1</sup>

§ 905. When a corporation of a *quasi* public nature, such as a boom company, whose franchises are granted for the public use, is in the lawful exercise of such franchises in constructing and maintaining booms for receiving logs upon a navigable river, an action can not be maintained by a riparian owner to enjoin such corporation, since this would be in effect to allow a private action against the state itself to subordinate the paramount public right to the subservient private right. And if such corporation has so constructed its works as to impede the navigation of the river, the remedy must be sought not in equity, but in an action at law for damages.<sup>2</sup>

§ 906. While as a general rule the courts of the United States have no jurisdiction to restrain proceedings in the state courts,<sup>3</sup> they will grant an injunction against a public officer of a state to restrain him from such proceedings under a void statute of the state as are likely to destroy a franchise created by the United States.<sup>4</sup> But the fact that a tax has been illegally imposed upon a franchise does not of itself constitute sufficient foundation for relief by injunction. In this respect a tax upon a franchise does not

<sup>1</sup> *Calcraft v. West*, 2 Jo. & Lat., 123.

<sup>3</sup> *Diggs v. Wolcott*, 4 Cranch, 179.

<sup>4</sup> *Osborn v. U. S. Bank*, 9 Wheat.

<sup>2</sup> *Cohn v. Wausau Boom Co.*, 47 Wis., 314.

differ from a tax levied upon any other species of property, real or personal, and a court of equity is governed by the same principles in granting or withholding an injunction against taxation of a franchise as are applicable in all other cases where its aid is invoked to restrain the collection of revenues. If, therefore, the only equity in support of the bill is the illegality of the tax imposed, the proper remedy is at law, and an injunction will not be allowed.<sup>1</sup> If, however, the injury is so irremediable in its nature as to render the legal remedy inadequate to redress the wrong complained of, as if there is danger of the destruction of the franchise itself by the threatened enforcement of an unconstitutional tax, an injunction may properly be allowed.<sup>2</sup>

§ 907. Where parties are fraudulently possessed of the franchises of a corporation created by law, and are exercising its functions, a bill for an injunction will lie in behalf of the persons aggrieved as a matter of private right, and it is not necessary that proceedings be first had by the proper officer of the state to oust the corporation of its franchise. And it is competent in such case for any number of the stockholders of the corporation to file a bill for an injunction.<sup>3</sup> But if no questions of private right are involved, the charge being of the usurpation of a franchise by a corporation assuming powers not within its charter, in direct contravention of a public statute, equity will not interfere by injunction, the proper remedy being by information in the nature of a *quo warranto*.<sup>4</sup>

<sup>1</sup>De Witt v. Hays, 2 Cal., 463. And see Mechanics Bank v. Debolt, 1 Ohio St., 591.

<sup>2</sup>Foote v. Linck, 5 McLean, 616; Woolsey v. Dodge, 6 McLean, 142. These cases are based upon Osborn v. U. S. Bank, 9 Wheat., 738.

<sup>3</sup>Putnam v. Sweet, 1 Chand., 286.

<sup>4</sup>Attorney-General v. Utica Ins. Co., 2 Johns. Ch., 371. This was an information filed by the Attor-

ney-General to restrain defendant, an insurance company, from conducting a banking business in violation of a statute prohibiting unincorporated banking associations. The injunction was refused, Kent, Chancellor, observing: \* \* \* "The right of banking was, formerly, a common law right belonging to individuals, and to be exercised at their pleasure. But the legislature thought proper, by

§ 908. Inadequacy of the remedy at law and the avoiding of a multiplicity of suits are strong grounds for the granting of injunctions to protect statutory privileges of an exclusive nature. And a franchise to carry out a lottery scheme for a public purpose is so far exclusive as to come within this rule and to be entitled to protection by injunction. In such case the commissioners appointed by law to carry out the purposes of the lottery are proper parties to institute an action in their own name to restrain a violation of the franchise committed to them; but the state is not a necessary party.<sup>1</sup>

§ 909. Where the existence of complainant's right or franchise depends upon a written instrument or contract, he will be required to produce such written evidence, or in default thereof to assign some satisfactory reason for his failure. If he omits to produce such evidence and fails to assign any satisfactory reason for such omission, he will not be allowed an injunction.<sup>2</sup>

the restraining act of 1804, and which has since been re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting only in those who can produce the grant; if exercised by other persons, it is the usurpation of a privilege, for which a competent remedy can be had by the public prosecutor in the Supreme Court. I can not find that this court has any ordinary concurrent jurisdiction in the case. \* \* \* The charge contained in the information savors, then, so much of a criminal offense that it would require a clear and settled practice to justify the interference of this court, when that interference is not called for in aid of a prosecution at law. The charge of an usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary, that the jurisdiction of this court would have been placed beyond all possibility of doubt, and have been distinctly announced, by a series of precedents, if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the court of K. B., and Kyd cites nearly an hundred instances, within the last century, of informations filed in the K. B. to call in question the exercise of a franchise."

<sup>1</sup> Lucas v. McBlair, 12 Gill & J., 1.

<sup>2</sup> Hankey v. Abrahams, 28 Md., 589.

§ 910. Legislative grants of the exclusive right of navigating rivers with steamboats have been the subject of judicial construction, with reference to the question whether a franchise thus conferred is entitled to protection by injunction. Where such a franchise is granted by a state legislature, and it in no manner conflicts with the power of Congress under the constitution to regulate inter-state commerce, the franchise may be protected by injunction.<sup>1</sup> And in New York it was formerly held that an exclusive franchise of this character was entitled to protection in equity, even in cases where it interfered with the right of navigation as between different states, and that citizens of another state might be enjoined from interfering with the exercise of the right, although their vessels were duly licensed under the laws of the United States as coasting vessels.<sup>2</sup> But upon appeal to the Supreme Court of the United States the doctrine of the New York courts was overthrown, and it was held that the acts of the state legislature granting the exclusive rights in question were repugnant to that clause of the constitution of the United States which authorizes Congress to regulate commerce, and that relief by injunction should not be allowed; and this doctrine was afterward acquiesced in by the courts of New York.<sup>3</sup>

§ 911. A distinction has been drawn between a franchise proper, granted by legislative authority upon adequate consideration, where the owner of the franchise is bound to the performance of certain obligations toward the public, and a mere monopoly of an ordinary branch of trade, over which the government has no exclusive prerogative, and where no consideration either of a public or private character is reserved for the grant. And while, as we have seen, the jurisdiction by injunction is freely exercised for

<sup>1</sup> *Moor v. Veazie*, 31 Me., 360.

<sup>2</sup> *Livingston v. Ogden*, 4 Johns. Ch., 48; *In re Vanderbilt*, Ib., 57; *Ogden v. Gibbons*, Ib., 150, affirmed 17 Johns., 488, but reversed,

9 Wheat., 1; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch., 300.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat., 1; *North River Steamboat Co. v. Livingston*, 3 Cow., 713.

the protection of franchises, the grant by the government of a monopoly in the exercise of an ordinary business over which the government has no control, without any consideration and to the exclusion of all others desiring to engage in such business, will not be protected by injunction. Thus, where by an amendment to the charter of a gas company authorizing it to lay its pipes through the streets and public grounds of a city, it is provided that the right shall be exclusive except against such other persons as may be authorized by legislature, such provision is held to constitute a monopoly which is not entitled to protection in equity, and an injunction will not be allowed to prevent another company from laying down its gas pipes. Nor will the fact that pending the controversy complainants have bought a parcel of land so situated with reference to the public highway that defendants are obliged to lay their main pipe through it, authorize an injunction in favor of complainants; their voluntary purchase of the land *pendente lite* does not entitle them under such circumstances to the favorable consideration of a court of equity, and the injury, if any, may be compensated by damages in an action of trespass.<sup>1</sup> In Kentucky, however, a different doctrine prevails; and it is there held that when a gas company asserts the exclusive right under its charter of manufacturing gas in a city, equity may entertain jurisdiction of a bill to enjoin a rival company from interference with plaintiff's rights, the jurisdiction resting upon the necessity of preventing cloud upon title.<sup>2</sup> It is also held in Kentucky that an injunction is the appropriate remedy to prevent a city, which has by contract conferred upon a gas company an exclusive right in the streets for a term of years, from conferring a like privilege upon another company.<sup>3</sup> But a gas company, supplying gas to a city, can not restrain a rival

<sup>1</sup> *Norwich Gas Light Co. v. Norwich City Gas L. Co.*, 25 Conn., 19.

<sup>3</sup> *City of Newport v. Newport L. Co.*, 84 Ky., 163.

<sup>2</sup> *Citizens G. L. Co. v. Louisville G. Co.*, 81 Ky., 263.

company from furnishing gas upon the ground that the latter is supplying a poorer quality of gas than required by the law under which it is incorporated.<sup>1</sup> And when the franchise claimed is that of an exclusive right to lay pipes in the streets for supplying water to a city, but the legal right is disputed and has never been determined, a preliminary injunction will be refused.<sup>2</sup>

<sup>1</sup> Jersey City G. Co. v. Consumers W. Co., 44 N. J. Eq., 427.  
ers G. Co., 40 N. J. Eq., 427.

<sup>2</sup> Atlantic City W. W. Co. v.

## II. ROADS AND RAILWAYS.

- § 912. Franchise in road protected; toll-gates.
- 913. Diligence required in seeking relief.
- 914. Exclusive railroad franchise between terminal points protected.
- 915. Exclusive nature of plaintiff's right; street railways.
- 916. Coach company enjoined from using street railway; rival street railways.

§ 912. Frequent instances of the interference of equity to prevent the violation of a franchise occur in the case of roads, as where the exclusive right to control and operate a highway, turnpike, or other road, has been granted to individuals or to corporations. Thus, where complainant's road is incorporated under an act of legislature, which provides that no other road shall be constructed within thirty years after the passage of the act, the act being held constitutional is regarded as creating a contract with the corporation and an injunction will be allowed against the operation of a rival road.<sup>1</sup> And although such injuries to a franchise as call for the interposition of equity and the granting of an injunction are generally in the nature of nuisances, and although the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restraint of nuisance, yet the relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate. And the destruction of toll-gates and preventing the collection of tolls, although a trespass, is such a one as can not be adequately compensated in damages in an action at law, and it will therefore be enjoined in equity.<sup>2</sup>

§ 913. As in all cases where the preventive jurisdiction of equity is invoked for the protection of rights, he who seeks relief against a violation of a franchise must make

<sup>1</sup> *Boston & L. R. Co. v. Salem & Co.*, 16 Pick., 512. And see *Central B. Co. v. Lowell*, 4 Gray, 474.  
<sup>2</sup> *Justices v. Griffin & W. P. P. R. Co.*, 11 Ga., 246.



his application promptly and without delay, and must use reasonable diligence in the assertion of his right. And where the grievance complained of consists in the construction of a road in such manner as to impair complainant's franchise, but defendants have been permitted for a long period to proceed with the construction of their work and to incur large expenditures without objection, the injunction will be withheld.<sup>1</sup>

§ 914. It would seem that actual injury to the franchise must exist before an injunction will be awarded, and that a mere apprehension of injurious results will not suffice if the work which it is sought to restrain may be undertaken for a legitimate purpose. And where complainants are by their charter vested with the exclusive franchise of transporting passengers and freight by railway between two cities, although they are entitled to the aid of equity to protect their franchise, yet a preliminary injunction will not be allowed to prevent two other corporations from effecting a union of their roads and forming a continuous line between the two points. The fact that such a junction may be used in derogation of complainants' rights will not warrant the interference, if there be another and a legitimate purpose for which it may be formed, since equity will not restrain the carrying out of undertakings having a legitimate object in view, merely because they may be perverted to unlawful purposes.<sup>2</sup> But when in such case it appears upon final hearing that complainants' rights are clear and unquestioned, and that they have been for more than thirty years in the enjoyment of their franchise of carrying passengers and freight between the two cities, an injunction will be allowed to prevent defendants from exercising the rights of complainants under their franchise to carry passengers through from city to city.<sup>3</sup> And where a railway company is vested with the

<sup>1</sup> South Carolina R. Co. v. Columbia & A. R. Co., 13 Rich. Eq., 339.

<sup>2</sup> Delaware & R. Co. v. Camden & A. R. Co., 2 McCart., 1.

<sup>3</sup> Delaware & R. Co. v. Camden & A. R. Co., 1 C. E. Green, 321, affirmed on appeal, 3 C. E. Green, 546.

exclusive franchise, as against all persons save the state and those upon whom the state has conferred it, to construct and operate a railroad across the state between two terminal cities, it is entitled to an injunction against the construction of a rival and competing road between the two cities, which is being constructed under legislative authority.<sup>1</sup> So a railway company invested with the privilege of loading and unloading its cars in the public streets of a city, which it has exercised for many years, may enjoin the city from enforcing an ordinance prohibiting the exercise of such privilege. And it is no objection to granting the relief in such case that the attempted invasion of plaintiff's rights is accompanied by acts which amount to personal trespasses.<sup>2</sup>

§ 915. To warrant relief by injunction against the violation of a franchise, satisfactory proof must be shown of the exclusive nature of plaintiff's right. And where a company claims the exclusive privilege of constructing and operating a street railway through a city, and seeks to enjoin another company from so doing, if the evidence is conflicting as to plaintiff's right to the enjoyment of the exclusive franchise claimed, because of doubt as to its compliance with the conditions annexed to the legislative grant, an injunction should not be granted upon an interlocutory application.<sup>3</sup> So it is held that the franchise of a street railway company does not entitle it to an injunction for the purpose of preventing another company from laying a double track through the same street, where it does not injure the first road, or interfere with its running.<sup>4</sup> And the construction of another railway company through the same streets included in a grant to a previous company does not of itself constitute an infringement of the franchise granted to the

<sup>1</sup> *Pennsylvania R. Co. v. National R. Co.*, 8 C. E. Green, 441.

<sup>3</sup> *Savannah R. Co. v. Coast Line R. Co.*, 49 Ga., 202.

<sup>2</sup> *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala., 115. See also *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala., 127.

<sup>4</sup> *New York & H. R. Co. v. Forty-second Street R. Co.*, 50 Barb., 285.

prior company, nor is it such an encroachment upon its rights as, in the absence of special injury, will warrant the interference of a court of equity.<sup>1</sup> But where a railway company, without authority of law, is proceeding to extend its track, such unauthorized extension is regarded as the attempted exercise of a valuable franchise, which is of itself sufficiently injurious to warrant a decree for a perpetual injunction.<sup>2</sup>

§ 916. A street railway company, having by its charter the franchise of operating its road over the streets of a city, is entitled to an injunction to restrain a coach company from using plaintiff's tracks by running its coaches thereon in competition with plaintiff in the business of carrying passengers and property, and from obstructing plaintiff in the use of its tracks.<sup>3</sup> So when a statute confirming certain franchises already enjoyed by street railway companies contains a prohibition against the construction of any other street railway parallel to those already constructed, within a given distance therefrom, a court of equity may enjoin another company from constructing a parallel road within the prohibited limit. And in such case, the injury being to a right secured to plaintiff by statute, no irreparable damage need be shown to warrant the relief.<sup>4</sup>

<sup>1</sup> Brooklyn R. Co. v. Coney Island R. Co., 35 Barb., 364.

<sup>2</sup> People v. Third Avenue R. Co., 45 Barb., 63.

<sup>3</sup> Camden Horse R. Co. v. Citi-

zens Coach Co., 31 N. J. Eq. (4 Stew.), 525.

<sup>4</sup> St. Louis R. Co. v. Northwestern St. L. R. Co., 69 Mo., 65.

## III. BRIDGES.

- § 917. General rule.  
918. Right need not be established at law.  
919. Jurisdiction not dependent upon defendant's profits.  
920. Landlord and tenant.  
921. Injunction withheld where right is doubtful.  
922. Negligence may bar relief.  
923. The right must be exclusive.  
924. When legal right doubtful convenience considered.  
925. Toll-bridge protected.  
926. Acquiescence a bar to relief.

§ 917. The exclusive right to construct and maintain bridges being a franchise dependent upon legislative grant, the general principles of the jurisdiction of equity for the protection of franchises extend to and cover cases of this nature. Where, therefore, the exclusive right to maintain a bridge and to collect toll is invaded and the owner's rights are infringed without constitutional authority, equity will enjoin such interference. The courts proceed in such cases upon the principle that the charter granting the franchise constitutes a contract between the public and the corporation, imposing certain burdens upon the corporation, which, when fulfilled, entitle it to protection in a court of equity.<sup>1</sup>

§ 918. As we have already seen, in considering the general grounds of relief for the protection of franchises, it is not necessary that the right should have been first established at law to warrant a court of equity in extending relief by injunction, since the creation of the franchise by legislative grant in the first instance is regarded as a sufficient assertion of the legal right. And where persons have been granted by act of legislature the exclusive privilege of building and maintaining a toll-bridge over a river, their right is sufficiently established at law to entitle them to the aid of equity for its protection, and any infringement of

<sup>1</sup> *Hartford B. Co. v. East Hartford Co. v. Hartford & N. H. Co.*, 17 Conn., 149; *Enfield T. B. Co.*, 40.

that right by the erection of another bridge to the prejudice of the first will be enjoined.<sup>1</sup>

§ 919. The jurisdiction in this class of cases is exercised entirely independent of the question as to whether the persons against whom the injunction is asked derive profit from their interference with complainant's rights. And where defendant, a railway corporation, allows persons to cross its railway bridge free of toll, thereby impairing complainant's franchise in a toll-bridge near at hand, an injunction will be granted to restrain the railway company from allowing its bridge to be used for the passage of any persons, vehicles or animals, for which complainant is entitled to take toll.<sup>2</sup>

§ 920. The relief may sometimes be allowed even though the relation of landlord and tenant exists between the parties as to the subject of the franchise to be protected. Thus, where complainants lease their bridge to defendants who use it in a manner expressly forbidden by the terms of their agreement, thereby greatly injuring complainants in the rights retained by them, an injunction will be allowed against such improper use. In such case, a court of equity proceeds upon the ground that defendants are guilty of maintaining a continual nuisance which can be best remedied by the preventive power of equity.<sup>3</sup>

§ 921. Where, notwithstanding the legislative grant of the franchise, the legal right is not sufficiently clear to enable the court to determine correctly, and where no irreparable mischief is alleged as likely to result from a continuance of the acts complained of, the court may very properly take into consideration the relative convenience and inconvenience to the parties by granting or withholding the relief, and be governed thereby in its determination. Thus, where one has received from parliament the right to con-

<sup>1</sup> *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35.

<sup>3</sup> *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb., 212.

<sup>2</sup> *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch., 625.

struct and maintain a bridge, and seeks to restrain a railway company from conveying its passengers across the river in steamboats, but does not show any injury likely to result from such acts which can not be adequately compensated in damages, the question of the respective rights of the parties being in doubt, an injunction will be withheld. In such a case equity will hesitate to interfere, lest by granting the relief prayed it might pronounce an opinion in favor of the legal right before a trial at law, although it may require defendant to keep an account until the legal right can be determined, and leave will be given complainant to apply again for an injunction.<sup>1</sup>

§ 922. Negligence on the part of the owner of the franchise in performing the conditions on which he receives his exclusive right may deprive him of the aid of equity for its protection. And where a bridge company has been granted the right to erect and maintain a bridge, the charter requiring it to provide certain locks which it has made no effort to build, and by a subsequent act of legislature it is relieved from building the locks, it will not be allowed to enjoin defendants, who are proceeding under legislative authority, from constructing the locks.<sup>2</sup>

§ 923. It has already been shown that in the exercise of the jurisdiction of equity for the protection of franchises the right which is the subject of legislative grant, and which it is sought to protect, must be exclusive in its nature. And where the grant of a franchise is not in terms a grant of an exclusive privilege, the government is presumed not to have intended to part with the exclusive right, but to retain it for the public benefit. Equity will not, therefore, lend its aid in such case for the protection of a right which was not intended to be exclusive.<sup>3</sup> Thus, complainants, whose right to erect and maintain a toll-bridge and to re-

<sup>1</sup> *Cory v. Yarmouth & N. R. Co.*,  
3 Hare, 598.

<sup>2</sup> *Enfield T. B. Co. v. Connecticut  
River Co.*, 7 Conn., 51.

<sup>3</sup> *Fall v. County of Sutter*, 21 Cal.,  
287; *President v. Trenton C. B.  
Co.*, 2 Beas., 46.

ceive the tolls is not in terms exclusive of all others, will not be permitted to enjoin the opening of another bridge within such distance as to greatly impair the profits of the first.<sup>1</sup> Especially will the aid of equity be withheld in such case where it appears that complainants have so far appropriated their bridge to the use of a railway company as to render it unsafe and dangerous for the ordinary purposes of travel for which it was originally constructed.<sup>2</sup>

§ 924. In case of doubt as to the actual legal right to the franchise in controversy, a court of equity will generally be influenced in granting or withholding the injunction by considerations of the relative convenience and inconvenience to the parties in the cause. And if in such case the inconvenience seems to be evenly balanced, equity will leave the parties as they are until the right can be determined at law. Thus, where the owner of a bridge over a river, authorized by act of parliament, seeks to restrain a railway company from carrying its passengers across the river in steamboats, the question of the legal right being somewhat in doubt, an injunction will not be allowed in the absence of any allegations of irreparable mischief, or of such injury as can not be adequately compensated in damages at law. The relief will also be refused under such circumstances lest equity may, by granting an injunction, pronounce an opinion in favor of the legal right before a trial at law. But the defendants may be required to keep an account, and complainant will have liberty to apply again for an injunction.<sup>3</sup>

§ 925. The grant to an incorporated company of the privilege or franchise of building a toll-bridge over a river, in consideration of the company agreeing to erect the bridge and keep it in repair, and to permit the passage of citizens at certain rates of toll, constitutes a contract, and the legis-

<sup>1</sup> Fall v. County of Sutter, 21 Cal., 237.

<sup>2</sup> President v. Trenton C. B. Co., 2 Beas., 46.

<sup>3</sup> Cory v. Yarmouth & N. R. Co., 3 Hare, 593.

lature can not alter or impair such contract without the consent of the corporators. And when a bridge company, incorporated with the powers above mentioned, have erected and maintained their bridge in accordance with their act of incorporation, the law of the state prohibiting the erection of another bridge within three miles of one already constructed, a court of equity may properly enjoin the construction and continuance of another bridge within the limits fixed by law.<sup>1</sup>

§ 926. But in this class of cases, as in all others, plaintiff's acquiescence in the construction and operation of that which is afterward sought to be enjoined may work an estoppel against the desired relief. And where plaintiff, an incorporated bridge company, has acquiesced for a number of years in the construction under municipal authority of a bridge within the limits of plaintiff's exclusive franchise, and has assisted in repairing the same when destroyed, such acquiescence will operate as an estoppel to prevent the granting of an injunction to restrain the further repairing of such bridge when again destroyed.<sup>2</sup>

<sup>1</sup> *Micou v. Tallassee Bridge Co.*,  
47 Ala., 652.

<sup>2</sup> *Fremont F. & B. Co. v. Dodge Co.*, 6 Neb., 18.



## IV. FERRIES.

§ 927. General rule.

928. Relief not granted where remedy exists at law.

929. Complainant must be free from blame.

930. Modification of general rule.

931. Protection extended to land necessary for enjoyment of franchise.

932. Rival ferries on river between two states.

933. County enjoined from constructing rival ferry.

§ 927. The right to maintain a ferry being a franchise whose value lies in its exclusiveness, equity may enjoin any unauthorized interference with or interruption of such right, upon the ground of preventing multiplicity of suits.<sup>1</sup> So the erection of a bridge in such close proximity to a ferry whose franchise is created by law, as to endanger its profits and jeopardize the exclusive right of the proprietors of the ferry, constitutes sufficient ground to warrant a court of equity in granting an injunction for the protection of the franchise.<sup>2</sup> So a city, which is invested with the exclusive franchise of maintaining ferries, and of establishing, controlling and receiving the revenues of all ferries between certain points, may enjoin the operation of a rival ferry by unauthorized persons between such points.<sup>3</sup> The rule is, however, to be accepted with the qualification that the right must be exclusive in its nature to entitle it to the protection of equity. And where complainants show no exclusive ferry privileges or franchise, they will not be allowed to enjoin the keeping of another ferry at the same place.<sup>4</sup>

<sup>1</sup> *McRoberts v. Washburne*, 10 Minn., 23; *City of Laredo v. Martin*, 52 Tex., 548; *Midland T. & F. Co. v. Wilson*, 28 N. J. Eq. (1 Stew.), 537. And see *Broadnax v. Baker*, 94 N. C., 675; *Power v. Village of Athens*, 99 N. Y., 592; *Mason v. Harpers Ferry B. Co.*, 17 West Va., 396.

<sup>2</sup> *Gates v. McDaniel*, 2 Stew., 211.

See also *Mason v. Harpers Ferry B. Co.*, 17 West Va., 396.

<sup>3</sup> *Mayor v. Starin*, 106 N. Y., 1.

<sup>4</sup> *Butt v. Colbert*, 24 Tex., 355.

§ 928. In the exercise of the jurisdiction for the protection of franchises courts of equity will look into the question of whether relief may be had at law, and if it appears that the remedy at law in damages is ample an injunction will be refused.<sup>1</sup> Where, however, upon an amended bill complainant shows the exclusive right to a ferry, which is being violated by defendant, and shows his inability to procure proof so as to proceed with an action at law, he is entitled to restrain the infringement of his franchise, even though a former application had been refused on the ground that the remedy at law was ample.<sup>2</sup>

§ 929. He who seeks the aid of equity to restrain encroachments upon his franchise must himself be free from blame, since negligence and inattention to the business of his franchise and to the wants of the public will estop him from relief. Thus, where complainant claims the exclusive right to operate a ferry within certain limits, he will not be allowed to enjoin defendant from maintaining a ferry in violation of such right, where it appears from the evidence that complainant has been guilty of such a degree of inattention and gross carelessness as would warrant the forfeiture of his rights in a proper proceeding for that purpose.<sup>3</sup>

§ 930. Equity will only interfere for the protection of a franchise against those whose conduct as regards the general public is such as to impair the right of the owner of the franchise. In accordance with this principle, it has been held that private persons will not be enjoined at the suit of a ferry owner from using their own boats for the transportation of themselves and families, the public not being permitted to use them.<sup>4</sup> And it would seem that the proprietors of a ferry, even though they may not have forfeited

<sup>1</sup> Long v. Merrill, N. C. Term R., 112; Power v. Village of Athens, 19 Hun, 165.

<sup>2</sup> Long v. Merrill, N. C. Term R., 256; S. C., 2 Murph., 339.

<sup>3</sup> Ferrell v. Woodward, 20 Wis., 458.

<sup>4</sup> Trent v. Cartersville B. Co., 11 Leigh, 521. And see Hunter v. Moore, 44 Ark., 184.

their franchise, may by non-user deprive themselves of any right to relief in equity.<sup>1</sup>

§ 931. The owner of a ferry who has received his franchise by legislative grant is entitled to the protection of equity to restrain the laying out of a public road through grounds adjoining his dock, which have been used by him for a long period of years in connection with his ferry, and which are necessary for its beneficial use.<sup>2</sup>

§ 932. While, as has already been shown, equity will lend its aid by injunction for the protection of an exclusive ferry privilege or franchise, yet when plaintiff's only authority is a charter from one state authorizing him to operate a ferry upon a navigable river which forms the boundary between two states, and he shows no exclusive right upon the opposite shore in the other state, he will not be allowed an injunction to restrain the operations of a rival ferry.<sup>3</sup>

§ 933. Upon a bill by the owner of a ferry to enjoin the municipal authorities of a county from constructing another ferry adjacent to his own, without tendering him damages for the taking and injury of his property, when upon the pleadings and affidavits there is great doubt whether the municipal authorities have taken the proper legal steps for condemning private property, an injunction may properly be granted until the hearing.<sup>4</sup> And the owner of land upon both banks of a river, having a franchise by prescription to maintain a public ferry, may restrain the county authorities from an unauthorized attempt to appropriate his franchise and to establish a free ferry.<sup>5</sup>

<sup>1</sup> *Trent v. Cartersville B. Co.*, 11 Leigh, 521.

<sup>2</sup> *Flanders v. Wood*, 24 Wis., 572.

<sup>3</sup> *Challiss v. Davis*, 56 Mo., 25.

<sup>4</sup> *County Commissioners v. Humphrey*, 47 Ga., 565.

<sup>5</sup> *Supervisors v. McFadden*, 57 Miss., 618.

## CHAPTER XVI.

### OF INJUNCTIONS AGAINST THE INFRINGEMENT OF PATENTS.

I. NATURE AND GROUNDS OF THE JURISDICTION . . . . .	§ 934
II. EFFECT OF PRIOR ADJUDICATIONS . . . . .	953
III. PRINCIPLES UPON WHICH RELIEF IS GRANTED . . . . .	960

#### I. NATURE AND GROUNDS OF THE JURISDICTION.

- § 934. Object of the relief; the forum.
- 935. Judicial discretion; conditions imposed.
- 936. Establishing right at law; recent patents.
- 937. Province of injunction; relative convenience and inconvenience.
- 938. Plaintiff's right must be free from doubt.
- 939. Controversy as to right will bar relief.
- 940. Presumptions necessary to warrant relief.
- 941. Acquiescence by the public; exclusive enjoyment.
- 942. The doctrine further considered.
- 943. Prior use of plaintiff's invention.
- 944. Unsupported theory insufficient; English rule.
- 945. Repeal of patent; expiration; death of defendant.
- 946. Patentee not enjoined from bringing actions.
- 947. Invention must stand on its own merits.
- 948. Plea that defendant was only a salesman.
- 949. Violation of injunction.
- 950. Property in manufactured articles; foreign sovereign.
- 951. Master of vessel enjoined from using patented machinery.
- 952. Effect of defendant's consent to injunction.

§ 934. The jurisdiction of equity to restrain the infringement of letters patent for inventions is exercised for the prevention of irreparable injury, vexatious litigation and a multiplicity of suits, as well as for affording protection to the rights of inventors.<sup>1</sup> And the preventive relief is granted

<sup>1</sup> 2 Story's Eq., § 930.

in aid of the legal right whose protection is the ultimate object sought.<sup>1</sup> The right to interfere by injunction in this class of cases is exercised only by the United States courts, the state courts being devoid of jurisdiction.<sup>2</sup> And while the state courts have unquestioned jurisdiction to determine questions of title or of contract rights pertaining to letters patent they have no power to restrain an infringement, even as an incident to an action growing out of contracts relating to patents, the federal courts alone having power to determine questions of infringement.<sup>3</sup> Nor has a state court jurisdiction to restrain defendants from manufacturing and selling under letters patent until they pay the royalties claimed by plaintiffs under a license, when the actual controversy is as to the validity of the patent and plaintiffs' right to its exclusive use, the federal courts having exclusive jurisdiction in such cases.<sup>4</sup>

§ 935. Substantially the same rules prevail in determining applications for preliminary injunctions in patent causes as in other cases, and the granting of the relief is a matter of sound judicial discretion, and where greater injury is likely to result to complainants from withholding the relief than to defendants from granting it, it may be allowed.<sup>5</sup> And the court may impose conditions, either for granting or refusing the relief, and may examine into the state of the litigation, the nature of the improvement and the extent of the infringement, as well as the comparative inconvenience to the parties.<sup>6</sup>

§ 936. The doctrine was formerly held in England that an injunction would not be allowed until the right had been established at law, but it would seem that the juris-

<sup>1</sup> *Bacon v. Jones*, 4 Myl. & Cr., 436.

<sup>2</sup> *Parkhurst v. Kinsman*, 2 Halst. Ch., 600; U. S. Revised Statutes, 1874, § 4921. And see this section construed in *Yuengling v. Johnson*, 1 Hughes, 607.

<sup>3</sup> *Continental S. S. Co. v. Clark*, 100 N. Y., 365.

<sup>4</sup> *Hat S. M. Co. v. Reinoehl*, 102 N. Y., 167.

<sup>5</sup> *Irwin v. Dane*, 4 Fish., 359.

<sup>6</sup> *Furbush v. Bradford*, 1 Fish., 317.

diction may now be exercised on showing color of title, coupled with an assertion of right which is not denied.<sup>1</sup> In this country, the jurisdiction exercised by the federal courts over actions in equity pertaining to patents being derived from statute, these courts do not in all cases require a verdict at law upon the title before granting even a final injunction.<sup>2</sup> And where the rights under the patent are clear, and the infringement is free from doubt, the patentee will not be compelled to proceed at law, but he may at once apply to the equity side of the court for relief.<sup>3</sup> And the allowance of a jury trial to test the question of the alleged infringement, on an application for a preliminary injunction, is not a condition precedent to the relief, nor is it to be regarded as a matter of right, but rather as resting in the sound discretion of the court.<sup>4</sup> But if the patent has never before been the subject of litigation, either at law or in equity, plaintiff may be required to give bond before the granting of the injunction.<sup>5</sup> And when there has been no adjudication at law sustaining the validity of the patent, the courts may require plaintiff to show an exclusive possession and exercise of the right before granting a preliminary injunction.<sup>6</sup> So where plaintiff's patent has been issued less than two months, and he has exercised no rights under it, and there has been no trial at law, an interlocutory injunction will be refused.<sup>7</sup> And notwithstanding the English rule that a final and perpetual injunction will not

<sup>1</sup> *Universities v. Richardson*, 6 Ves., 689. And see *Hicks v. Raincock*, Dick., 647.

<sup>2</sup> *Sickles v. Gloucester Manufacturing Co.*, 1 Fish., 222; *Sanders v. Logan*, 2 Fish., 167.

<sup>3</sup> *Potter v. Muller*, 2 Fish., 465; *Shelly v. Brannan*, 4 Fish., 198; S. C., 2 Bissell, 315. See also *Wise v. Grand Avenue R. Co.*, 33 Fed. Rep., 277.

<sup>4</sup> *Brooks v. Norcross*, 2 Fish., 661;

*Potter v. Fuller*, *ib.*, 251; *Motte v. Bennett*, *ib.*, 642. And see *Motte v. Bennett* for an exhaustive history of the jurisdiction of equity in this class of cases, both in England and America.

<sup>5</sup> *Shelly v. Brannan*, 4 Fish., 199; S. C., 2 Bissell, 315.

<sup>6</sup> *Hockholzer v. Eager*, 2 Sawy., 361; *Gutta Percha Co. v. Goodyear Co.*, 3 Sawy., 542.

<sup>7</sup> *Brown v. Hinkley*, 6 Fish., 370.

be granted when the answer denies the validity of the patent, without sending the parties to law to decide that question,<sup>1</sup> in this country it rests in the discretion of the court to grant the relief, with or without a trial at law.<sup>2</sup> It would seem, however, that a reasonable doubt as to complainant's right, or the validity of the patent, constitutes ground for requiring a trial at law.<sup>3</sup>

§ 937. The province of a preliminary injunction in a patent cause is to preserve the rights of the patentee pending the litigation of his title. If his title has already been fully established, or is so clear as to preclude a reasonable doubt of its validity, a preliminary injunction may be granted, as in the case of a final injunction, regardless of the injury to defendant; but the case must be substantially free from doubt to warrant this course.<sup>4</sup> And where the granting of the writ would be more likely to produce than to prevent irreparable mischief, neither an absolute nor a conditional injunction will be allowed.<sup>5</sup> In all such cases, there being an element of discretion which enters largely into the consideration of the motion for a preliminary injunction, the patentee is only entitled to the best judgment of the court upon a question of judicial discretion, and

<sup>1</sup> *Bacon v. Jones*, 4 Myl. & Cr., 436; *Renard v. Levinstein*, 2 Hem. & M., 628.

<sup>2</sup> *Goodyear v. Day*, 2 Wal. Jr., 283; *Buchanan v. Howland*, 5 Blatch., 151.

<sup>3</sup> *Ogle v. Edge*, 4 Wash. C. C., 584. Washington, J., says: "I take the rule to be in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which together with the alleged infringement is verified by affidavit, if he has been in possession of it by having used or sold it, in part or in the whole, the court will grant an

injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right. But if there appear to be a reasonable doubt as to the plaintiff's right, or to the validity of the patent, the court will require the plaintiff to try his title at law, sometimes accompanied with an order to expedite the trial, and will permit him to return for an account in case the trial at law should be in his favor."

<sup>4</sup> *Morris v. Lowell Manufacturing Co.*, 3 Fish., 67. And see *Howe v. Morton*, 1 Fish., 586.

<sup>5</sup> *Day v. Candee*, 3 Fish., 9.

not absolutely to the injunction on any given state of facts.<sup>1</sup>

§ 938. An interlocutory injunction against the infringement of a patent will not be allowed unless complainant's title and defendant's infringement are either admitted or are so clear and palpable that the court can entertain no doubt on the subject.<sup>2</sup> And whenever, upon the facts presented, a fair and reasonable doubt exists as to whether defendant has actually been guilty of an infringement, or where the right is, in point of law, at least doubtful, and the questions involved are exclusively for a jury, or where a reasonable doubt exists as to the originality and novelty of complainant's invention, or as to the substantial identity between the articles manufactured by defendant and those of complainant, a preliminary injunction will be withheld.<sup>3</sup> So when the issue in the cause as to the validity of the patent is new, and not only is the novelty of the invention denied, but a fair doubt as to its novelty is raised by affidavits introduced to show a prior use, and no public acquiescence in plaintiff's claim is shown, equity will refuse an injunction *in limine*.<sup>4</sup> So, too, if it does not satisfactorily appear that complainant is the first and sole inventor of the improvements claimed by his patent, the court will not interfere in the first instance.<sup>5</sup> And where a preliminary injunction has already been granted, but the evidence is doubtful as to the originality of the patent, the injunction may be dissolved, defendants being required meanwhile to keep an account of their sales.<sup>6</sup>

<sup>1</sup> *Potter v. Whitney*, 3 Fish., 77; S. C., 1 Lowell, 87.

<sup>2</sup> *Parker v. Sears*, 1 Fish., 93; *American Co. v. City of Elizabeth*, 4 Fish., 189.

<sup>3</sup> *Dodge v. Card*, 2 Fish., 116; *Sullivan v. Redfield*, 1 Paine, 441; *Winans v. Eaton*, 1 Fish., 181; *Illingworth v. Spaulding*, 9 Fed. Rep., 154; *Cross v. Livermore*, 9

Fed. Rep., 607; *Bradley & H. M. Co. v. Charles Parker Co.*, 17 Fed. Rep., 240.

<sup>4</sup> *Mowry v. Grand Street & N. R. Co.*, 10 Blatch., 89; S. C., 5 Fish., 586.

<sup>5</sup> *Thomas v. Weeks*, 2 Paine, 92.

<sup>6</sup> *Sheriff v. Coates*, 1 Russ. & M., 159.



§ 939. So long as there is a substantial controversy as to the equities of the parties, the court will not dispose of those equities upon a motion for an interlocutory injunction, which does not permit the questions involved to be inquired of and defined accurately according to the approved usages of chancery, and interlocutory relief will be refused, especially when the granting of the application might seriously imperil defendant's rights, and its refusal will not injure plaintiff.<sup>1</sup> And if the patent itself is of recent date, and the specifications are obscure and the proof of infringement is meagre and unsatisfactory, an injunction will not be allowed even upon final hearing. But in such case the bill may be retained and complainant required to bring an action at law within a reasonable time.<sup>2</sup> So when plaintiff's patent is recent and its validity is disputed by defendants, and the facts upon which plaintiff's claim to an injunction is based are not clearly established and are involved in much doubt, the court may properly refuse an interlocutory injunction.<sup>3</sup>

§ 940. The presumptions in favor of the novelty of a patent, sufficient to constitute the foundation for a preliminary injunction, may be some or all of the following: the oath of the patentee that he was the original inventor; the granting of the patent after full investigation; undisturbed enjoyment by the patentee of the exclusive rights granted by the patent, coupled with acquiescence on the part of the public; direct adjudications at law or in equity establishing its validity, and prior injunctions restraining its infringement. When such grounds of presumption co-exist in favor of the novelty of a patented invention, an injunction will not be refused, or, if granted, will not be dissolved except upon the most conclusive evidence impeaching the patent.<sup>4</sup>

<sup>1</sup> *Smith v. Cummings*, 1 Fish., 152; *Pullman v. Baltimore & O. R. Co.*, 4 Hughes, 236; S. C., 5 Fed. Rep., 72.

<sup>2</sup> *Muscan Hair Mfg. Co. v. American Hair Mfg. Co.*, 1 Fish., 320.

<sup>3</sup> *McGuire v. Eames*, 15 Blatch., 312.

<sup>4</sup> *Hussey v. Whitely*, 2 Fish., 120. And see *Orr v. Littlefield*, 1 Woodb. & M., 13; *Ogle v. Edge*, 4 Wash. C. C., 584; *Doughty v. West*, 2

§ 941. Acquiescence on the part of the public in complainant's use of his patented invention is an important consideration in determining a motion for an injunction against the infringement of a patent. And where the party aggrieved can show an undisturbed user and possession for a reasonable time he is entitled to the relief.<sup>1</sup> And this exclusive possession, if of sufficient duration, may warrant the relief, even in the absence of any previous adjudications

Fish., 553; *Grover Co. v. Williams*, 2 Fish., 133.

<sup>1</sup>Orr v. Littlefield, 1 Woodb. & M., 13; *Hill v. Thompson*, 3 Meriv., 622; *Stevens v. Keating*, 2 Ph., 333; *Ogle v. Edge*, 4 Wash. C. C., 584; *Foster v. Moore*, 1 Curt. C. C., 279; *Isaacs v. Cooper*, 4 Wash. C. C., 259; *Washburn v. Gould*, 3 Story, 156, 169; *Bickford v. Skewes*, Web. P. C., 211; *Goodyear v. The Central R. R. of New Jersey*, 1 Fish., 626; *Potter v. Holland*, Ib., 382. "The reason for the presumption in favor of the validity of the grant is the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded." Story, J., in *Foster v. Moore*, *supra*. The principles upon which a court of equity will interfere for the protection of a patent before the right has been established at law are well stated by the Vice Chancellor in *Caldwell v. Vanvliessen*, 9 Hare, 415, as follows: "The question whether the court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty

of this court to protect property pending litigation; but when it is called upon to exercise that duty, the court requires some proof of title in the party who calls for its interference. In the case of a new patent, this proof is wanting; the public whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent (the enjoyment of course including use), the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the court is bound at once to interfere for their protection, unless there are other sufficient grounds for withholding its interference."

in favor of the validity of the patent.<sup>1</sup> While the courts have not attempted to fix any definite rule as to the length of time during which the exclusive use and enjoyment of the right must have been continued, it must be sufficient to raise a presumption in favor of the validity of the patent.<sup>2</sup> And such presumption is greatly strengthened by former adjudications in support of the patent.<sup>3</sup> So when plaintiff has long been in the enjoyment of his rights under the patent, and the question of infringement is free from doubt, it is proper to grant an injunction.<sup>4</sup> And when the infringement is clear, and plaintiffs have proven an uninterrupted use for many years, and have established their patent in an action at law, and have also procured its extension, their right to an injunction is clear and undoubted.<sup>5</sup> So when plaintiff has for a long period been in exclusive possession under his patent, with the acquiescence of the public in his rights, and the novelty of his invention is not questioned, except by the claim that it was anticipated by certain patents which have been repeatedly construed by the patent office as not anticipating plaintiff's invention, in which construction the court concurs, it is proper to grant the injunction.<sup>6</sup>

§ 942. Where, however, plaintiff's allegations of exclusive possession are met and avoided by averments and proof of a more peaceable and exclusive possession by defendants, under patents purchased and used by them, no injunction will be allowed.<sup>7</sup> And when plaintiff's patent has never been adjudged valid in any action, mere lapse of time is not

<sup>1</sup> *Goodyear v. Central R. R.* of New Jersey, 1 Fish., 626.

<sup>2</sup> *Potter v. Muller*, 2 Fish., 465. And it has been held that such possession for eight years was sufficient evidence, *prima facie*, to warrant an injunction previous to a trial at law. *Foster v. Moore*, 1 Curt. C. C., 279.

<sup>3</sup> *Potter v. Muller*, 2 Fish., 465; *Potter v. Holland*, 1 Fish., 382.

<sup>4</sup> *Chase v. Wesson*, 6 Fish., 517; S. C., 1 Holmes, 274.

<sup>5</sup> *Cook v. Ernest*, 5 Fish., 396; S. C. *sub nom.*, *McComb v. Ernest*, 1 Woods, 195.

<sup>6</sup> *Miller v. Androscoggin Pulp Co.*, 5 Fish., 340; S. C., 1 Holmes, 142.

<sup>7</sup> *Parker v. Sears*, 1 Fish., 93.

considered sufficient evidence of public acquiescence in and recognition of his right to warrant an injunction; but the acquiescence must be accompanied by circumstances indicating that it would not have occurred had any reasonable doubt existed as to the validity of the patent.<sup>1</sup> And when plaintiff fails to show any exclusive possession of the invention for a considerable length of time, accompanied by acquiescence on the part of the public, and when he shows no decree or judgment sustaining his patent and no irreparable injury is shown as likely to result if the injunction is refused, the court will decline to interfere *in limine*.<sup>2</sup>

§ 943. Upon a motion for a preliminary injunction to restrain the violation of a patent, an affidavit filed by defendant in opposition to the motion, alleging upon information and belief that plaintiff's invention was used and sold long prior to his patent, will not avail; since if defendant has such information he should disclose it fully, and he can not be permitted to swear merely to his conclusion and withhold the particulars as to the information. But when a prior use of the same article is afterward shown by affidavit in detail, and specimens of the article are produced, such doubt is thrown over the question of novelty as to entitle defendants to a dissolution of the injunction.<sup>3</sup>

§ 944. It is not regarded as proper to sustain a motion for a preliminary injunction in a patent cause upon a theory of plaintiff's invention, which, although it may be true, is not supported by affidavits.<sup>4</sup> And under the practice of the English Court of Chancery, a plaintiff seeking to restrain the infringement of his patent was required to state that his invention was new, or had never been practiced in the kingdom at the date of his patent.<sup>5</sup>

<sup>1</sup> *Guidet v. Palmer*, 10 Blatch., 217; S. C., 6 Fish., 82. And see this case as to the facts upon which the court may refuse an interlocutory injunction against the infringement of a patent when the public interest is concerned.

<sup>2</sup> *Earth Closet Co. v. Fenner*, 5 Fish., 15.

<sup>3</sup> *Young v. Lippman*, 9 Blatch., 277; S. C., 5 Fish., 230.

<sup>4</sup> *American Co. v. Sullivan Co.*, 14 Blatch., 119.

<sup>5</sup> *Sturz v. De La Rue*, 5 Russ.,

§ 945. Upon a bill to procure the repeal of an interfering patent it is competent for the court to grant an injunction in connection with the other relief sought by the action.<sup>1</sup> But in an action brought by the United States to repeal letters patent for an invention, an injunction will not be granted *pendente lite* to restrain defendant from prosecuting actions for infringement, since the government has no interest in such actions.<sup>2</sup> And where the bill is not filed until after the expiration of the patent it can not be maintained as a bill for an injunction.<sup>3</sup> And where the record shows the death of defendant, if there is no proof of infringement by his executor, no injunction will be granted against such executor.<sup>4</sup>

§ 946. Since the granting of letters patent confers upon the patentee the right to institute actions for infringement of his patent, it follows that a court of equity will not interfere by injunction to restrain him from bringing such actions before his patent has been adjudged to be invalid.<sup>5</sup> And a defendant, who has been found guilty of infringing letters patent can not restrain the patentee from interfering with customers of such defendant in the use of the manufactured article.<sup>6</sup> But when a patentee, as a condition of obtaining an extension of his patent, files a disclaimer as to a part of his invention, and after procuring the extension he surrenders his patent and procures a re-issue embracing the disclaimed invention, he can not maintain a bill to enjoin its infringement.<sup>7</sup>

§ 947. The fact that plaintiff, who seeks an injunction against the infringement of his patent, does not or can not make his patented article without using the apparatus cov-

322. And see *Hill v. Thompson*, 3 Meriv., 622.

<sup>1</sup> *Ayling v. Hull*, 2 Cliff., 494.

<sup>2</sup> *United States v. Colgate*, 22 Blatch., 412.

<sup>3</sup> *Vaughan v. Central Pacific R. Co.*, 4 Sawy., 280. And see *Root v. Railway Co.*, 105 U. S., 189.

<sup>4</sup> *Draper v. Hudson*, 6 Fish., 327.

<sup>5</sup> *Asbestos Felting Co. v. U. S. & F. S. Felting Co.*, 13 Blatch., 453.

<sup>6</sup> *Tuttle v. Matthews*, 24 Blatch., 16.

<sup>7</sup> *Leggett v. Avery*, 101 U. S., 256.

ered by another patent under which defendant claims, can not be considered by the court upon an application for an injunction, since the case of each invention must be treated independently upon its own merits when presented for adjudication.<sup>1</sup>

§ 948. The pendency of a plea by defendant to a bill seeking an injunction to restrain him from infringing plaintiff's patent, in which he avers that he acted only as a salesman in selling the patented article, having no interest in the business in question except as an employe, will not prevent the granting of an injunction; nor will the court be prevented from granting the relief by the fact that such plea has been set down for hearing, but has not yet been heard.<sup>2</sup>

§ 949. A defendant who has been enjoined from using plaintiff's patent is not at liberty to disregard the injunction by merely taking certain parts and improvements from his machine which he conceives to be covered by plaintiff's patent, and then to continue the manufacture of the patented article. Nor is the fact that he has thus acted under the advice of counsel a sufficient justification for thus disobeying the injunction, the proper course being to take the judgment of the court upon the matter by a motion to dissolve, or otherwise.<sup>3</sup> But where, after a final decree restraining an infringement of plaintiff's patent, defendants manufacture a machine which had not been made or sold before the decree in the cause, and the differences between which and plaintiff's invention are not merely colorable but present questions which have not before been raised between the parties, the court will not decide such questions upon a motion for an attachment for a violation of the injunction, but will leave it to be determined by an original action for that purpose.<sup>4</sup>

§ 950. Notwithstanding the rights and privileges of the

<sup>1</sup> *Young v. Lippman*, 9 Blatch., 277; S. C., 5 Fish., 230.

<sup>3</sup> *Hamilton v. Simons*, 5 Bissell, 77.

<sup>2</sup> *Maltby v. Bobo*, 14 Blatch., 53.

<sup>4</sup> *Liddle v. Cory*, 7 Blatch., 1.

patentee, it is held that the property in articles which are manufactured in violation of a patent is in the infringer. The court will not, therefore, interfere by injunction to prevent a foreign sovereign from removing his property from the country upon the ground that such property infringes plaintiff's patent. And this is true, even though such sovereign has voluntarily made himself a party defendant to the action, and submitted to the jurisdiction of the court, since the courts will not interfere with the property of foreign sovereigns.<sup>1</sup>

§ 951. A master of a vessel who is in possession of the vessel, which is fitted with machinery which is clearly an infringement of plaintiff's patent, may be enjoined from using such machinery, even though the vessel was so fitted before he took command, and although he is not a part owner of the vessel.<sup>2</sup>

§ 952. When after the argument of a motion for an injunction in a patent cause, and after the motion is submitted, defendants file their written consent to the granting of the motion, the court will grant the injunction if desired upon such consent, but will not express any opinion upon the merits of the action, there being no longer any real contest between the parties.<sup>3</sup>

<sup>1</sup> *Vavasseur v. Krupp*, 9 Ch. D., 351.

<sup>3</sup> *American M. P. Co. v. Vail*, 15 Blatch., 315.

<sup>2</sup> *Adair v. Young*, 12 Ch. D., 13.

## II. EFFECT OF PRIOR ADJUDICATION.

- § 953. The general doctrine stated.
- 954. Applications of the doctrine.
- 955. The same.
- 956. Extension and re-issue.
- 957. Prior judgment by agreement; trial at law; award.
- 958. Limitations upon the doctrine.
- 959. Effect of re-issue covering wider ground.

§ 953. Previous adjudications in favor of the validity of the patent whose protection is sought by injunction afford strong foundation for the relief, and are entitled to great weight in determining the application.<sup>1</sup> And where the patent has been upheld by repeated adjudications complainants are entitled to a preliminary injunction against a clear infringement.<sup>2</sup> So where complainant relies upon prior adjudications in support of his patent as a ground for relief against its infringement, although it is competent for defendant to show that the title was not fairly in controversy in the former cases, or that some material fact was overlooked, yet the considerations which would justify the

<sup>1</sup> *Orr v. Littlefield*, 1 Woodb. & M., 13; *Woodworth v. Hall*, *Ib.*, 248; *Woodworth v. Edwards*, 3 Woodb. & M., 120; *Gibson v. Van Dresar*, 1 Blatch., 532; *Potter v. Holland*, 4 Blatch., 238; *Goodyear v. Central R. R. of New Jersey*, 1 Fish., 626; *Parker v. Brant*, *Ib.*, 53; *Potter v. Fuller*, 2 Fish., 251; *Potter v. Whitney*, 3 Fish., 77; *S. C.*, 1 Lowell, 87; *Conover v. Mers*, 3 Fish., 386; *Goodyear v. Evans*, *Ib.*, 390; *Goodyear v. Berry*, *Ib.*, 439; *Goodyear v. Rust*, *Ib.*, 456; *Thayer v. Wales*, 9 Blatch., 170; *S. C.*, 5 Fish., 130. Thus, it is said that "where complainant has made out, not merely a grant of the patent, but possession and use and sale under it for some time

undisturbed, and besides this a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction, till a full trial on the merits counteracts or annuls it." Per Woodbury, J., in *Orr v. Littlefield*, *supra*. As to the effect of an adjudication sustaining the validity of the patent upon an interference in the patent office upon the right to restrain an infringement, see *Barr Company v. New York & N. H. A. S. Co.*, 24 Blatch., 566.

<sup>2</sup> *Thayer v. Wales*, 9 Blatch., 170; *S. C.*, 5 Fish., 130; *Putnam v. Keystone B. S. Co.*, 38 Fed. Rep., 234.



court in renewing the discussion of the patentee's title, which is already *res judicata*, should be such as, if presented to the court after the trial at law, would have sufficed to set aside the verdict.<sup>1</sup> And while decisions in former suits concerning the same patent are binding only upon the parties to those suits, yet such adjudications, in so far as they bear upon the points actually in issue between other parties, will be overruled with extreme reluctance.<sup>2</sup> So when plaintiff shows long enjoyment under his patent, with repeated adjudications at law sustaining its validity, he is entitled to an injunction against its infringement.<sup>3</sup>

§ 954. Although it is the duty of the court, upon the hearing of the motion for a preliminary injunction, notwithstanding the fact of previous adjudications sustaining the validity of the patent, to examine the case anew, if defendant was not a party to the former proceedings, yet when the questions of fact are identical the court must recognize such decisions as entitled to very great weight in determining the application.<sup>4</sup> And where the patent has been sustained on a full hearing against other defendants, and the infringement is clear, and especially where the precise form of machine used by defendant has been previously passed upon by the court on the question of infringement, complainant is entitled to have his rights promptly protected by injunction.<sup>5</sup> And where the validity of complainant's patent has been established by repeated adjudications, and it is manifest that neither the public nor the defendants will suffer any inconvenience from the issuing of the writ, the fact that it is not alleged that defendants are insolvent, or that complainants would suffer irreparable injury by waiting until a final hearing, constitutes no bar to the relief.<sup>6</sup>

<sup>1</sup> Parker v. Brant, 1 Fish., 58.

<sup>2</sup> Potter v. Fuller, 2 Fish., 251.

<sup>3</sup> Newall v. Wilson, 2 DeGex, M. & G., 282.

<sup>4</sup> Potter v. Whitney, 3 Fish., 77; S. C., 1 Lowell, 87. And see Good-

year v. Evans, 3 Fish., 390; Goodyear v. Berry, Ib., 439; Goodyear v. Rust, Ib., 456.

<sup>5</sup> Conover v. Mers, 3 Fish., 386.

<sup>6</sup> Goodyear v. Central R. R. of New Jersey, 1 Fish., 626.

§ 955. When the validity of plaintiff's patent has been the subject of frequent litigation, and when it has been confirmed in repeated cases, upon a motion for a preliminary injunction the court will ordinarily examine only the question of infringement; and this being shown, plaintiff will be allowed an injunction.<sup>1</sup> And the effect of a verdict and judgment sustaining the patent in an action at law upon a bill in equity to restrain an infringement is to make out a *prima facie* case of title in the plaintiff and of infringement by defendants.<sup>2</sup>

§ 956. The fact that the patent is extended after the adjudications sustaining its validity does not affect the application of the doctrine under consideration. Thus, where a patent has been sustained during its original term by four different adjudications, one of them being against the same defendant for the use of the same process involved in the application for the injunction, after the extension of the patent the novelty of the invention and the validity of the patent are regarded as sufficiently established by the prior adjudications.<sup>3</sup> But the existence of a substantial doubt as to the identity of the invention covered by the re-issue with that contained in the original is sufficient ground for denying the motion to restrain the infringement of the re-issue.<sup>4</sup>

§ 957. The application of the rule giving effect to prior adjudications is not affected by the fact that the prior judgment was recovered by agreement of the parties, no

<sup>1</sup> *Robertson v. Hill*, 6 Fish., 465; *Odorless Excavating Co. v. Lauman*, 4 Woods, 129.

<sup>2</sup> *Wells v. Gill*, 6 Fish., 89. And see this case as to the effect upon the motion for an injunction of a writ of error to reverse the judgment at law. And as to the effect of a decision adverse to defendants in a case of interference before the United States Patent Office upon the application for an injunction

to restrain them from infringing plaintiff's patent, see *Pentlarge v. Berston*, 14 Blatch., 352.

<sup>3</sup> *Tilghman v. Mitchell*, 4 Fish., 615; S. C., 9 Blatch., 18. And see *Clum v. Brewer*, 2 Curt. C. C., 506, where the same doctrine is maintained, although the relief was refused on other grounds.

<sup>4</sup> *Poppenhusen v. Falke*, 4 Blatch., 493.

fraud or collusion being shown.<sup>1</sup> And if the result of a trial at law to determine the right is satisfactory to a court of equity, it may at once interfere for the protection of the patent, even though the defendant is about taking further steps at law.<sup>2</sup> And an award sustaining the validity of the patent, on a reference being had in a trial at law, is entitled to the same consideration as a verdict.<sup>3</sup>

§ 958. Notwithstanding the great weight which, as we have already seen, the courts attach to prior adjudications sustaining the validity of a patent, the recovery of a verdict for plaintiff, in an action at law upon a patent, is not necessarily conclusive upon his right to an injunction, and the court may, upon such application, consider the true interpretation of the patent, irrespective of the former verdict,<sup>4</sup> especially where a writ of error is pending to the proceedings at law.<sup>5</sup> And where complainant relies upon a previous verdict of a jury and judgment of a court of law, for the establishing of his patent upon an application for an injunction, he must aver in his bill that such proceedings have taken place.<sup>6</sup> If the verdicts upon which complainant relies have been rendered upon claims so inconsistent and contradictory that the court can not say with certainty what is and what is not an infringement of the patent, the injunction will be refused.<sup>7</sup> And the fact that another court has, upon an interlocutory application, granted an injunction against other parties restraining the infringement of the patent is not, of itself, a sufficient adjudication of plaintiff's right to justify an injunction when the infringement is positively denied by answer and affidavits.<sup>8</sup>

§ 959. Where the validity of a patent has been sustained by a decision at law during its original term, and thereafter

<sup>1</sup> *Orr v. Littlefield*, 1 Woodb. & M., 13. But see *American M. P. Co. v. Vail*, 15 Blatch., 315.

<sup>2</sup> *Boulton v. Bull*, 3 Ves., 140; *Bridson v. Benecke*, 12 Beav., 7.

<sup>3</sup> *Lister v. Eastwood*, 26 L. T., 4.

<sup>4</sup> *Many v. Sier*, 1 Fish., 31.

<sup>5</sup> *Day v. Hartshorn*, 3 Fish., 32.

<sup>6</sup> *Parker v. Brant*, 1 Fish., 58.

<sup>7</sup> *Parker v. Sears*, 1 Fish., 93.

<sup>8</sup> *Sargent Manufacturing Co. v. Woodruff*, 5 Biss., 444.

a re-issue is obtained covering a wider ground than that adjudicated in the original, all that lies between the limits of the original and of the re-issue is disputed territory. And if in such case the infringement which it is sought to enjoin lies wholly within that disputed territory, the application for relief will be denied.<sup>1</sup>

<sup>1</sup> *Poppenhusen v. Falke*, 2 Fish., 181.

## III. PRINCIPLES UPON WHICH RELIEF IS GRANTED.

- § 960. Defendant's *bona fides*; patent to defendant.  
961. Injunction not granted on patent alone.  
962. Considerations of hardship and convenience.  
963. *Prima facie* infringement must be shown; recent patent.  
964. Clear infringement required when patent not adjudicated; good faith of defendants.  
965. Acquiescence and encouragement by plaintiff a bar to relief.  
966. Limitations upon the doctrine.  
967. Defendant's pecuniary responsibility; questions of damage.  
968. Bond or security in lieu of injunction.  
969. Plaintiff's prior possession and use considered; partial infringement; denial by answer.  
970. Dissolution.  
971. Rights of licensee.  
972. The same.  
973. Actual infringement not necessary; apprehensions of future infringement; experiments.  
974. Public convenience; injury to third persons.  
975. Validity; novelty; infringement.  
976. Infringement after verdict; promise by defendant not to continue infringement.  
977. Subsequent patent to defendant; doubt as to novelty.  
978. Proof as to inventor; dissolution.  
979. Parties.  
980. Questions of jurisdiction.  
981. Expiration of patent; assignee of defendant *pendente lite*.  
982. Grounds of dissolution; account; appeal.  
983. Penalty for not marking patented articles; injunction upon the hearing.  
984. Process not patented may be protected.  
985. When jurisdiction exercised over foreigners.  
986. Violation.  
987. Account not incidental to injunction.

§ 960. Where defendant is acting in good faith under letters patent covering his process of manufacture, he has a *prima facie* right to continue, and the court will not, upon *ex parte* affidavits, on an application for a preliminary injunction, decide the whole merits of a *bona fide* issue, and thus anticipate a final judgment upon the legal questions involved. And if in such case defendant shows a belief

that he has a just defense, and has not wilfully pirated complainant's invention, the court will require a case of evident mistake of law, or of fact, or both, in the defense thus interposed, before it will resort to the remedy by injunction.<sup>1</sup> But the fact that defendant, after the alleged infringement, has received a patent for the article manufactured by him, will not prevent an injunction if the infringement is satisfactorily established, since the granting of a subsequent patent merely serves to indicate the opinion of the officers granting it, upon an *ex parte* examination of the subject, and is by no means conclusive.<sup>2</sup> Especially if complainant has already established his title at law, and obtained an injunction in the same court, the relief will be allowed, although defendant claims to have patented his apparatus in good faith.<sup>3</sup> And where complainant makes out a strong *prima facie* case for an injunction, it will not be refused because defendant alleges that he is the first and original inventor, his evidence resting upon an *ex parte* application to the patent office and upon his own affidavit, he having slept upon his rights for a long period of years.<sup>4</sup>

§ 961. Equity will never interfere upon the mere patent alone, without proof of user or sales, or of recoveries at law,<sup>5</sup> and where complainant has failed in previous trials at law to establish his rights, and it does not appear that they have been acquiesced in by the public, the relief will be withheld.<sup>6</sup> And where complainant's patent has but a short time yet to run, and there can be but little difficulty in determining what would be a proper indemnity for the use of his invention in the manufacture of defendant's machines, defendant's apparatus embracing improvements which can not be used without the original invention of

<sup>1</sup> *Goodyear v. Dunbar*, 1 Fish., 472. M., 290; *Toppan v. National Co.*, 4

<sup>2</sup> *Morse Pen Co. v. Esterbrook*, 3 Blatch., 509; S. C., 2 Fish., 196.

Fish., 515.

<sup>6</sup> *Serrell v. Collins*, 4 Blatch., 61;

<sup>3</sup> *Sickels v. Tileston*, 4 Blatch., *Toppan v. National Co.*, Ib., 509.  
109. And see *North v. Kershaw*, Ib., 70;

<sup>4</sup> *Potter v. Stevens*, 2 Fish., 163. *Muscan H. M. Co. v. American H.*

<sup>5</sup> *Hovey v. Stevens*, 1 Woodb. & M. Co., Ib., 174.

complainant, upon which they are engrafted, the defendant may be permitted, in lieu of a temporary injunction, to give bond with approved security to account and pay such sum as the court may finally decree.<sup>1</sup>

§ 962. While considerations of the relative hardship and inconvenience to the respective parties, by granting or withholding the relief, may properly be taken into account in determining the application, yet where the right is well established and the violation clear, neither considerations of public or private convenience, or of hardship to the defendant, will prevent the court from interfering.<sup>2</sup> More especially where complainant's right has been established by previous adjudication will the court refuse to be governed by considerations of hardship to defendant from granting the injunction, since it is manifestly unjust that a patentee, whose rights have already been established, should be under the necessity of meeting litigation in a great variety of cases, thereby rendering his patent comparatively valueless.<sup>3</sup> And when there has been long and quiet enjoyment under the patent, and its validity has been sustained by the courts, an injunction will not be withheld upon the doctrine of comparative inconvenience.<sup>4</sup>

§ 963. While it is essential that the patentee should produce *prima facie* evidence of his title, yet this alone will not suffice to entitle him to the injunction, since, however clearly the validity of the patent may be established, a *prima facie* case of infringement must be made out before equity will interpose.<sup>5</sup> But if the case be free from doubt in other respects, the relief will not be refused because the patent is a recent one.<sup>6</sup>

§ 964. When it is sought to restrain an alleged infringe-

<sup>1</sup> Howe v. Morton, 1 Fish., 586.

<sup>3</sup> Ely v. Monson & B. M. Co., 4

<sup>2</sup> Sickels v. Tileston, 4 Blatch., Fish., 64.

109; Potter v. Fuller, 2 Fish., 251;

<sup>4</sup> Davenport v. Jepson, 4 DeGex, F. & J., 440.

Ely v. Monson & B. M. Co., 4 Fish., 64.

<sup>5</sup> Hill v. Thompson, 3 Meriv., 626.

<sup>6</sup> Clark v. Ferguson, 1 Gif., 184.

ment of a patent whose validity has never been sustained by any prior adjudication, acquiescence in its use being relied upon as the foundation for relief, the infringement must be palpable and clear. And while the fact that defendants are using a machine which is openly made, sold and used under patents, and which the manufacturers have put upon the market in good faith and in open competition with the machines made by plaintiff and in the belief that they were not trespassing upon his rights, will not of itself constitute a sufficient defense if defendants are adjudged guilty of an infringement upon the final hearing, it constitutes a reason why the court should hesitate to interfere before final decree, when there is no suggestion of irreparable injury in the meantime, or of any want of ability to respond in the event of a final recovery.<sup>1</sup>

§ 965. In considering applications for relief by injunction against the infringement of patents, courts of equity require of the patentee due and reasonable diligence in the assertion of his rights, and a long or unreasonable delay in invoking relief, or acquiescence for a considerable length of time in the infringement complained of, may afford sufficient ground for refusing an injunction.<sup>2</sup> Thus, where the patentee has stood by for many years and acquiesced in the use of the article which he afterward seeks to enjoin, such acquiescence, without objection and without demand of compensation, is regarded as conclusive evidence that the continuance of the use of his invention, for the short period yet remaining before the expiration of his patent, will not constitute such an irreparable injury as to warrant an injunction.<sup>3</sup> And where the patentee, while licensing certain persons to use his invention, has permitted others to use it without license and without objection, such conduct may be

<sup>1</sup> *Burleigh Rock Drill Co. v. Lobdell*, 1 Holmes, 450.

*Combe*, 1 Ir. Ch., 284; *Blanchard v. Sprague*, 1 Cliff., 288; *Hockholzer v. Eager*, 2 Sawy., 361.

<sup>2</sup> *Parker v. Sears*, 1 Fish., 93; *Goodyear v. Honsinger*, 3 Fish., 147; *S. C.*, 2 Biss., 1; *Baxter v.*

<sup>3</sup> *Parker v. Sears*, 1 Fish., 93.



taken into consideration by the court, and although it is satisfied of the validity of the patent it will not interfere by an absolute and unconditional injunction, but will grant a temporary writ, with leave to defendant to come in and have the same dissolved upon giving security to complainant.<sup>1</sup> So it is held that acquiescence by a patentee for a considerable length of time in the use of his patented machine by defendant, who had previously constructed and used the same by permission of the patentee, will justify the court in refusing to interfere.<sup>2</sup> And where plaintiffs had permitted defendants to use the patented machine for a period of more than eighteen months, with full knowledge by plaintiffs of such user, such delay was held to constitute sufficient ground for refusing an injunction.<sup>3</sup> So if complainant has encouraged or acquiesced in the infringement, or has permitted the erection of works and large expenditures of money in the manufacture of the patented invention, he will not be protected.<sup>4</sup> And where defendant has manufactured under authority of a patent and with full knowledge of complainants for a considerable length of time, without molestation, and has invested money in the business, to warrant an injunction the case must be free from all reasonable doubt.<sup>5</sup>

§ 966. Notwithstanding the well settled doctrine denying relief by injunction when the patentee has long delayed the assertion of his rights, the fact that plaintiffs have been compelled to litigate their rights under their patent by a long series of suits, and have but recently obtained an adjudication in their favor, has been held a sufficient excuse for their apparent laches in seeking preventive relief in equity.<sup>6</sup> And a delay of three months in filing the bill after plaintiff

<sup>1</sup> *Goodyear v. Honsinger*, 3 Fish., 436; *Bridson v. Benecke*, 12 Beav., 147; S. C., 2 Biss., 1.      <sup>7</sup>; *Bovill v. Crate*, L. R. 1 Eq., 388;

<sup>2</sup> *Blanchard v. Sprague*, 1 Cliff., 288.      *North v. Kershaw*, 4 Blatch., 70; *Sykes v. Manhattan*, 6 Blatch., 496.

<sup>3</sup> *Hockholzer v. Eager*, 2 Saw., 361.      <sup>5</sup> *North v. Kershaw*, 4 Blatch., 70.      <sup>6</sup> *Rumford Works v. Vice*, 14

<sup>4</sup> *Bacon v. Jones*, 4 Myl. & Cr., Blatch., 179.

is apprised of the character of defendant's infringement affords no ground for refusing an interlocutory injunction, when defendant has not thereby been induced to change his position, and when he has had no communication with plaintiff in the interval.<sup>1</sup> Where there has not been a long or uninterrupted possession under the patent, and there has been a delay of two years upon plaintiff's part in seeking to restrain the alleged infringement, it is proper to refuse the injunction *in limine*, but without prejudice and with liberty to plaintiff to bring his action at law.<sup>2</sup> But when, in such case, plaintiff proceeds with his action at law and obtains a verdict therein, it is then proper to grant an injunction, even though a bill of exceptions has been tendered in the action at law which has not yet been finally disposed of on error to a court of review.<sup>3</sup>

§ 967. Defendant's pecuniary responsibility is a material circumstance to be taken into account on the application for an injunction, as is also the fact that he does not make or vend the patented machine, but merely uses it, the only injury resulting therefrom to the patentee being the loss of his royalty, and not a damaging and constantly increasing competition.<sup>4</sup> So where the injury to the patentee resulting from the infringement consists, not in the use of the invention, but in depriving him of compensation for such use, the price or value of a license constituting the rule of damages, an injunction is not the proper remedy to enforce payment of the money, since the measure of damages being a certain and fixed sum, ample redress can be had at law.<sup>5</sup>

§ 968. Although defendant's machine may be an infringement of that of complainant, yet if it contain other and valuable improvements not covered by complainant's

<sup>1</sup> Union Co. v. Binney, 5 Fish., 166.

<sup>4</sup> Morris v. Lowell, 3 Fish., 67.

<sup>2</sup> Baxter v. Combe, 1 Ir. Ch., 284.

<sup>5</sup> Sanders v. Logan, 2 Fish., 167.

<sup>3</sup> Baxter v. Combe, 3 Ir. Ch., 256, 207.  
affirming S. C., *Ib.*, 245.

And see Livingston v. Jones, *Ib.*,

patent, and if the issuing of the writ would be likely to prejudice the actual rights of defendant, without being as beneficial to complainant as an account of profits with security for their payment, the injunction will be withheld on condition of defendant's accounting and giving security for payment.<sup>1</sup> And the practice is sometimes adopted of granting the injunction in the alternative, unless defendant will give bond in a sum fixed by the court to respond in such damages, if any, as may be awarded upon the final decree.<sup>2</sup> So where plaintiff is not a manufacturer of the patented article and will be adequately protected by a just compensation for the use of his invention, and defendants are heavy manufacturers with a large capital invested in their business, the sudden stoppage of which would be disastrous to them and would be of no benefit to plaintiff, it is proper to allow defendants the opportunity of giving a bond to secure plaintiffs, in lieu of granting an injunction.<sup>3</sup> And where the validity of complainant's patent is denied on the ground of a prior public use, the patent itself never having been adjudicated, and the general allegation in the bill of acquiescence on the part of the public is unsupported by proof and denied by the answer, defendant will not be enjoined from constructing a single machine merely for his own use, if he gives security to complainant for all loss and damage that may result to him by reason of the construction and use of the machine.<sup>4</sup> But where the infringement is manifest and the right to an injunction clear, it will not be withheld because of defendant offering security for damages and an account of sales.<sup>5</sup>

<sup>1</sup> *Stainthorpe v. Humiston*, 2 Fish., 311. And see *Howe v. Morton*, 1 Fish., 586. As to the considerations governing the court in determining whether to grant an injunction or to require defendant to keep an account, see *Plimpton v. Spiller*, 4 Ch. D., 286.

<sup>2</sup> See *Chipman v. Wentworth*, 5 Fish., 302; S. C., 1 Holmes, 96;

*Wells v. Gill*, 6 Fish., 89; *Middlings Purifier Co. v. Christian*, 4 Dill., 448.

<sup>3</sup> *Dorsey Co. v. Marsh*, 6 Fish., 387. And see *Yuengling v. Johnson*, 1 Hughes, 607.

<sup>4</sup> *Morris v. Shelbourne*, 4 Fish., 377; S. C., 8 Blatch., 266.

<sup>5</sup> *Tracy v. Torrey*, 2 Blatch., 275.

§ 969. On an application to enjoin the infringement of a patent, the court may take into consideration complainant's possession of the right and his use of the invention before the application for the grant of letters patent.<sup>1</sup> But the use must be a public use, under an avowed claim of right, since, if this be not so, there is no exclusive possession as against the public, and no claim in which it can acquiesce.<sup>2</sup> It is not, however, necessary that all the grants of right in the patent should have been infringed, but the injunction will issue for the violation of a portion of them.<sup>3</sup> And a mere denial by answer of the equity of the bill does not prevent the court from looking into the law and the facts of the case, and where the right depends upon the interpretation to be given to the letters patent the court will look into the instrument and construe it, notwithstanding the answer denies the right to the relief.<sup>4</sup>

§ 970. An injunction in patent cases is not designed to delay or impair the right of trial by jury, but rather to make the *prima facie* title prevail until such trial can be had.<sup>5</sup> Hence, where an injunction has been granted on proof of former recoveries and long possession, it will not necessarily be dissolved on an answer denying the validity of the patent, but will be continued to allow an issue at law upon that question.<sup>6</sup> Nor will the injunction be dissolved because of doubts as to the validity of the patent, growing out of errors on the part of the officers issuing it, when steps have been taken in Congress to correct such errors by appropriate legislation.<sup>7</sup>

§ 971. A licensee of a patent, if his rights be infringed, is entitled to the aid of an injunction to restrain such in-

<sup>1</sup> Sargent v. Seagrave, 2 Curt. C. C., 553.

<sup>5</sup> Woodworth v. Rogers, 3 Woodb. & M., 135.

<sup>2</sup> Toppan v. National Co., 4 Blatch., 509.

<sup>6</sup> Orr v. Merrill, 1 Woodb. & M., 376.

<sup>3</sup> Potter v. Holland, 4 Blatch., 238; S. C., 1 Fish., 382.

<sup>7</sup> Woodworth v. Hall, 1 Woodb. & M., 389.

<sup>4</sup> Clum v. Brewer, 2 Curt. C. C., 506.

fringement.<sup>1</sup> And where a patentee has by contract given a license to plaintiff to make and use the patented invention, the suing out of an injunction restraining plaintiff from such manufacture is a breach of the contract and sufficient ground for maintaining an action thereon.<sup>2</sup> But where plaintiff held a license to manufacture under defendants' patent, defendants having the option to terminate plaintiff's license if the sums due for fees were not paid, it was held that a court of equity had no jurisdiction to entertain a bill to obtain a construction of the license and to restrain defendants from giving notice of their option to terminate the license and from attempting to collect the fees, but that the remedy should be sought at law.<sup>3</sup>

§ 972. Where an injunction is in full force against the use of a patented machine, the court will not allow its use by parties claiming under the patentee of the invention enjoined.<sup>4</sup> But, although a provisional injunction will be granted against the licensee of a patent, if applied for during his violation of the restrictions subject to which he received his license, yet if it appears that such violation was made under a misapprehension of his rights, and has been discontinued, the injunction will be withheld.<sup>5</sup> And where defendant claims the right to manufacture under an assignment of a license from plaintiffs, an interlocutory injunction will be refused when it is not shown that defendants are using the invention in any manner not warranted by the license.<sup>6</sup> Where, by the terms of the license, a forfeiture is incurred by non-payment, the remedy may be either at law to enforce the payment, or in equity to restrain the use of the patent.<sup>7</sup> But a license to use the patent, granted by one

<sup>1</sup> *Brammer v. Jones*, 2 Bond, 100.

<sup>5</sup> *Wilson v. Sherman*, 1 Blatch.,

<sup>2</sup> *Sullings v. Goodyear Dental* 536.

*Vulcanite Co.*, 36 Mich., 313.

<sup>6</sup> *Belding v. Turner*, 8 Blatch.,

<sup>3</sup> *Florence S. M. Co. v. Singer M.* 321.

*Co.*, 8 Blatch., 113.

<sup>7</sup> *Woodworth v. Weed*, 1 Blatch.,

<sup>4</sup> *Woodworth v. Edwards*, 3 Woodb. & M., 120.

165. It may well be doubted, however, whether this rule can be

tenant in common, can not be enjoined by another tenant in common, their right to sell or license being equal.<sup>1</sup> And where it appears by the answer that defendant was acting under a license from complainant, the injunction will be dissolved.<sup>2</sup>

§ 973. It is not necessary to the issuing of the writ that the wrong should actually have been committed, but reasonable grounds for belief that an infringement may occur in the future will warrant the injunction, when the title has been established at law.<sup>3</sup> So although no actual infringe-

maintained consistently with the established principle that equity will never interfere where there is adequate remedy at law.

<sup>1</sup> *Cium v. Brewer*, 2 Curt. C. C., 506.

<sup>2</sup> *Goodyear v. Bourn*, 3 Blatch., 266.

<sup>3</sup> *Poppenhusen v. New York*, 4 Blatch., 184. This was a bill for an injunction where a verdict had been had against the defendants in the same court in an action at law upon the same patents. The bill alleged violation of complainant's right after the verdict, and that defendants would continue such violation in future, unless restrained by injunction. Ingersoll, J., delivering the opinion of the court, says: "The writ of injunction is a remedial writ in the nature of a prohibition. The object of the present motion for an injunction is to prevent the commission of injuries in the future, not to redress injuries that are past. The writ prayed for is to act as a remedy against a threatened wrong by preventing the commission of such wrong; and it is not necessary, before a writ to prevent a wrong can issue, that the wrong should actually have been com-

mitted. If it were, the remedy by injunction would be a very inadequate one. If the rights of a party under a patent have been fully and clearly established, and an infringement of such rights is threatened, or if, when they have been infringed, the party has good reason to believe they will continue to be infringed, an injunction will issue. It issues for the reason that there is good ground to believe that in future they will be infringed. Where a trial at law has been had, resulting in a verdict in favor of the patentee, and the right to the improvement patented has been fully established, to the satisfaction of the court, and the infringement of right made clear, such a trial resulting in such a verdict is sufficient, without any other proof, to authorize the court to grant an injunction to prevent any future violation of right. Such a trial, with such a result, affords sufficient proof, that, in future, there will be an infringement, unless such infringement is restrained by injunction. It is, under such circumstances, almost a matter of course that the injunction should be allowed. (*Neilson v. Harford*, Webster's Patent Cases, 373.) Such

ment has occurred, yet if there is a deliberate intention expressed and about to be carried into execution to infringe under a claim of right to use the patented invention, plaintiff is entitled to relief by injunction. And while the making of the patented article by defendant in the course of *bona fide* experiments, with a view of improving upon the invention, is not of itself an infringement, yet equity will enjoin a defendant from manufacturing a quantity of the patented goods under the plea of experimenting, even though the quantity be small.<sup>1</sup> But where the owners of rival machines have submitted them to a competitive examination before judges appointed by an institute for the promotion of manufactures and the arts, and such judges have determined that one of the machines is entitled to a medal of superiority, an injunction will not lie in behalf of one of the competitors to prevent the delivery of such medal.<sup>2</sup>

§ 974. When the patented machine the use of which it is sought to enjoin is being used by defendants for the convenience of the public, as in the case of a stone-crusher used in repairing the roads in a large cemetery adjacent to a city, the use of the machine being necessary for the public convenience in burying the dead, an injunction may be withheld *in limine* upon terms of defendant paying into court the amount of plaintiff's royalty upon the machine, to abide the result of the suit.<sup>3</sup> But, while the question of public convenience may thus be considered in passing upon an application for an interlocutory injunction to restrain the infringement of a patent, it is held that the fact that the granting of the injunction will indirectly work an injury to third persons affords no ground for denying the relief in a case otherwise proper for an injunction.<sup>4</sup> Where,

a trial at law, resulting in such a verdict, to the entire satisfaction of the court, has taken place between the parties to this suit." See also *Frearson v. Loe*, 9 Ch. D., 48.

<sup>1</sup> *Frearson v. Loe*, 9 Ch. D., 48.

<sup>2</sup> *New York E. V. Co. v. Ameri-*

can Institute, 24 Fed. Rep., 561; S. C. upon final hearing, 28 Fed. Rep., 722.

<sup>3</sup> *Blake v. Greenwood Cemetery*, 14 Blatch., 342.

<sup>4</sup> *Rumford Works v. Vice*, 14 Blatch., 179.

however, plaintiffs have no patented machine in operation and are neither manufacturing nor using it, and the effect of an injunction would be to close up defendant's business and it would be productive of great expense and injury to third parties, it is proper for the court to take such facts into consideration in refusing an application for an interlocutory injunction.<sup>1</sup>

§ 975. To warrant relief by injunction against the infringement of letters patent, the court must be satisfied of the validity of plaintiff's patent, of the novelty of his invention and of the fact of infringement.<sup>2</sup> If, therefore, grave doubt exists as to the validity of the patent, an interlocutory injunction will be denied.<sup>3</sup> So if the court, upon the evidence before it, entertains strong doubts as to the novelty of plaintiff's invention, it will refuse to interfere by injunction *in limine*.<sup>4</sup> And where defendant's article which is alleged to be an infringement of plaintiff's patent is being manufactured under letters patent, the court, upon an application for an interlocutory injunction, is at liberty to indulge the presumption that it is not an infringement, and may deny the injunction, leaving the question of infringement to be determined upon the final hearing. So when the fact of infringement is fully denied by the answer under oath, and by affidavits in support of it, the question being left in great doubt upon the papers presented upon the motion for an injunction, it is proper to withhold the relief upon an interlocutory application, leaving the matter to be determined upon the hearing.<sup>5</sup>

§ 976. When a verdict has already been recovered against defendants in an action at law in the same court

<sup>1</sup> Hockholzer v. Eager, 2 Sawy., 361. And see Dorsey Co. v. Marsh, 6 Fish., 387.

<sup>2</sup> Fales v. Wentworth, 1 Holmes, 96; S. C., 5 Fish., 302; Jones v. Hodges, 1 Holmes, 37; Sargent Manufacturing Co. v. Woodruff, 5 Biss., 444.

<sup>3</sup> Fales v. Wentworth, 1 Holmes, 96; S. C., 5 Fish., 302; Huber v. Myers Sanitary Depot, 33 Fed. Rep., 48; Wollensak v. Sargent, 33 Fed. Rep., 840.

<sup>4</sup> Jones v. Hodges, 1 Holmes, 37.

<sup>5</sup> Sargent Manufacturing Co. v. Woodruff, 5 Biss., 444.



and upon the same patents, and a bill is then filed to procure an injunction, the bill alleging a violation of plaintiff's rights after verdict, it will not suffice for defendants to answer that what they have done since the finding of the verdict was not in violation of plaintiff's right; but they should state explicitly that they do not intend to commit any infringement in the future.<sup>1</sup> Nor will the fact that since the commencement of suit defendants have ceased to infringe, and do not threaten further infringement, prevent the issuing of a preliminary injunction, if a necessity for the writ existed at the time of filing the bill, plaintiffs alleging that they apprehend a continuance of the infringement. In such cases the patentee will not be compelled to rest his equities upon the mere assertion of defendants that the infringement shall not be repeated, and the court will impose the necessary restraint to prevent a repetition of the injury.<sup>2</sup> And it would seem that a mere promise by defendant not to continue the infringement is no bar to an injunction to prevent future infringement.<sup>3</sup>

§ 977. Complainant's patent being fully established at law, and the infringement being clearly proven, the injunction will not be refused because of defendant's reliance upon a subsequent patent to himself, which contains on its face satisfactory evidence that its process involves an infringement of the prior patent.<sup>4</sup> But to warrant the injunction, it must appear that defendant has either used the patented machine himself, or has employed others to use it for him, or has profited by its use.<sup>5</sup> And where the novelty of the invention is denied, and the question is involved in considerable doubt, the injunction will be withheld until a trial at law.<sup>6</sup>

<sup>1</sup> *Poppenhusen v. New York*, 4 Blatch., 184.

<sup>2</sup> *Potter v. Crowell*, 1 Abb. U. S. R., 89; S. C., 3 Fish., 112; *Jenkins v. Greenwald*, 2 Fish., 37; *Rumford Works v. Vice*, 14 Blatch., 179; *White v. Heath*, 10 Fed. Rep., 291.

<sup>3</sup> *Geary v. Norton*, 1 DeG. & Sm., 9.

<sup>4</sup> *Goodyear v. Evans*, 6 Blatch., 121.

<sup>5</sup> *Woodworth v. Hall*, 1 Woodb. & M., 249.

<sup>6</sup> *Booth v. Garely*, 1 Blatch., 247.

§ 978. Upon the application for the writ it must appear, either in the sworn bill, or by affidavit, that complainant is the inventor of the patent to be protected, and it does not suffice that he swore to this when he obtained his patent.<sup>1</sup> And on a motion for a dissolution of the injunction, upon affidavits, sufficient proof must be adduced to overcome the equity of the bill and the evidence supporting it.<sup>2</sup> And where a special injunction is granted upon bill filed, a motion to dissolve will not be heard upon the same evidence, or on new evidence improperly neglected on the former hearing, but new and material testimony will be required.<sup>3</sup>

§ 979. Equity will not, on the application of the legal owner, enjoin the equitable owner of a patent.<sup>4</sup> But where one person has the legal and another the equitable right to the patent, both should be joined in an action for infringement.<sup>5</sup> And where the infringement is the act of several persons jointly, they should all be made defendants, but if it is their separate act separate bills should be filed against them.<sup>6</sup> The directors of a corporate company who, as the agents of the company, have committed an infringement, should be made parties.<sup>7</sup> And the assignor of a patent, who still retains an interest in the patent, although none in the territory where the infringement occurred, is a proper party to a bill for an injunction.<sup>8</sup> So the assignee of part of a patent, within a particular territory, may properly enjoin the infringement in that territory.<sup>9</sup> And where one of three parties works a patented machine, which is owned by two others, the relief will be granted against all.<sup>10</sup>

<sup>1</sup> *Sullivan v. Redfield*, 1 Paine, 441.

<sup>2</sup> *Sparkman v. Higgins*, 1 Blatch., 205.

<sup>3</sup> *Woodworth v. Rogers*, 3 Woodb. & M., 135.

<sup>4</sup> *Clum v. Brewer*, 2 Curtis, 506.

<sup>5</sup> *Stimpson v. Rogers*, 4 Blatch., 333; *Goodyear v. Allyn*, 6 Blatch., 33; *Goodyear v. New Jersey R. R.*, 1 Fish., 626.

<sup>6</sup> *Dilly v. Doig*, 2 Ves. Jr., 486.

<sup>7</sup> *Betts v. DeVitre*, 34 L. J. Ch., 289; *Goodyear v. Phelps*, 3 Blatch., 91.

<sup>8</sup> *Woodworth v. Wilson*, 4 How., 712.

<sup>9</sup> *Ogle v. Edge*, 4 Wash. C. C., 584.

<sup>10</sup> *Woodworth v. Edwards*, 3 Woodb. & M., 120.

Nor will the court refuse to enjoin because a number of parties, all of whom are interested in the patent, have contributed to a common fund for the protection of their common rights by prosecuting infringements of those rights.<sup>1</sup>

§ 980. For the purpose of restraining the infringement of a patent the court need only have jurisdiction of the person.<sup>2</sup> But where defendant resides in another jurisdiction, in which the infringement occurred, the court will not interfere.<sup>3</sup> And it has been held that a defendant who is the owner of a patent in certain territory can not be enjoined from selling the patented machine in complainant's territory, on the ground that the law extends protection only to the thing patented, and not to its product.<sup>4</sup>

§ 981. An injunction may be granted, although the patent is about to expire, to restrain the sale of machines manufactured in violation thereof while it is yet in force.<sup>5</sup> And the provisions of the writ will be extended to an assignee of the defendant, who takes an assignment of defendant's rights *pendente lite*, and with full knowledge of all the proceedings.<sup>6</sup>

§ 982. Where an injunction is granted against the infringement of a patent, and at the same time complainant is ordered to bring an action at law to test his rights, delay in proceeding at law will constitute sufficient ground for a dissolution of the injunction, but defendants may still be required to keep an account after the dissolution.<sup>7</sup> And the court may, on sufficient cause shown, permit the injunction to be dissolved upon condition of defendants giving security to account to complainants if their right shall be established.<sup>8</sup> But a decree for an injunction in a patent cause,

<sup>1</sup> Potter v. Fuller, 2 Fish., 251.

<sup>2</sup> Wilson v. Sherman, 1 Blatch., 536.

<sup>3</sup> Goodyear v. Bourn, 3 Blatch., 266.

<sup>4</sup> Boyd v. Brown, 3 McLean, 295.

<sup>5</sup> Crossley v. Beverley, 1 Russ. & M., 166, note. See as to the right

to maintain a bill for an accounting, after the expiration of the patent, Root v. Railway Co., 105 U. S., 189.

<sup>6</sup> Parkhurst v. Kinsman, 2 Blatch., 78.

<sup>7</sup> Stevens v. Keating, 2 Ph., 333.

<sup>8</sup> Brooks v. Bicknell, 3 McLean, 250.

with a reference to a master to take an account of profits, is not considered a final decree from which an appeal will lie.<sup>1</sup>

§ 983. The penalty imposed by act of Congress for not marking patented articles does not affect the right to an injunction to restrain an infringement.<sup>2</sup> Nor is complainant barred from asking an injunction upon the hearing because of his neglect to apply for the relief by an interlocutory motion, although such neglect will impose upon him the obligation of making out a clear and unexceptionable title at the hearing.<sup>3</sup>

§ 984. A process of manufacture may, under certain circumstances, be protected by injunction, although not the subject of a patent. Thus, where defendant, through breach of contract and in violation of confidence, has become possessed of a secret process of manufacture, he will be enjoined from making any use of the secret. Although complainant in such a case may not be entitled to protection in equity as against the public generally, his process not being patented, he is entitled to protection against the defendant who has obtained possession of his secret in violation of the contract of the person by whom it was communicated to defendant.<sup>4</sup>

§ 985. The jurisdiction of equity for the protection of patents is exercised over foreigners within the limits of the country granting the patent, as well as over its own subjects and citizens. And an injunction will be allowed to restrain the citizens of one nation from using machinery patented to the citizens of another, on board their ships within the harbors of the nation granting the patent.<sup>5</sup>

<sup>1</sup> *Barnard v. Gibson*, 7 How., 650; *Humiston v. Stainthorp*, 2 Wal., 106.

<sup>2</sup> *Goodyear v. Allyn*, 6 Blatch., 33; S. C., 3 Fish., 374.

<sup>3</sup> *Bacon v. Spottiswoode*, 1 Beav., 382; *Buchanan v. Howland*, 5 Blatch., 151.

<sup>4</sup> *Morison v. Moat*, 9 Hare, 241.

<sup>5</sup> *Caldwell v. Vanvliссengen*, 9 Hare, 415. The principles applicable to injunctions against the infringement of patents by foreigners within the jurisdiction of the government granting the patent are well set forth by the Vice Chancel-

§ 986. One who has been enjoined from the infringement of a patent violates the mandate of the court by using

lor in this case, as follows: "I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be, not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights. \* \* \* Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the crown. Why, then, are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right which I have shown to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the crown. It was said that the prohibitory words of the patent were addressed only to the subjects of the crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the crown could be enforced personally against parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to

alter the case. \* \* \* In the argument on the part of the defendants much was said on the hardship of this court's interfering against them, and upon the inconvenience which would result from it; and some reference was made to the policy of this country; but it must be remembered that British ships certainly can not use this invention without the license of the patentees, and the burthens incident to such a license; and foreigners can not, I think, justly complain that their ships are not permitted to enjoy, without license and without payment, advantages which the ships of this country can not enjoy otherwise than under license and upon payment. It must be remembered that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within Her Majesty's dominions; and that, if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed, also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent, I apprehend, would be invalid. One principal ground of inconvenience suggested was, that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions;

a machine which in substance and principle contains important portions of the patent, although in other respects it may contain new and improved features. So if he uses another patent, similar in principle, the author of which has also been enjoined by the owner of the first patent, he is guilty of a contempt of court.<sup>1</sup> And a defendant who has been enjoined from infringing by the manufacture and sale of the article, is equally guilty of a violation of the writ, whether he sells in his own right or as the agent of another.<sup>2</sup> So working for wages in a shop or factory, where articles are manufactured infringing on complainant's patent, is a violation of the injunction, if done by one on whom the writ was served, and will be punished by attachment.<sup>3</sup> And in case of a wilful violation of an injunction against the infringement of a patent, it is proper for the court, on motion for an attachment against defendant, to impose upon him the payment of such counsel fees and disbursements as were necessary to establish the violation of the injunction.<sup>4</sup>

§ 987. The jurisdiction of the United States courts in this class of cases being derived wholly from statute, the English rule that the account is strictly incident to the injunction, and that where an injunction is refused an account will be denied, is not applicable in this country.<sup>5</sup> And if the patent has expired between the time of filing the bill and the hearing, the court may direct an account, although no injunction will be allowed against the future use of the article.<sup>6</sup>

but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the courts, to deal with that question; my duty is to administer the law and not to make it. Upon the grounds which I have referred to, I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions."

<sup>1</sup> *Woodworth v. Rogers*, 3 Woodb. & M., 135.

<sup>2</sup> *Potter v. Muller*, 2 Fish., 681.

<sup>3</sup> *Goodyear v. Mullee*, 5 Blatch., 429; S. C., 3 Fish., 209.

<sup>4</sup> *Doubleday v. Sherman*, 4 Fish., 253.

<sup>5</sup> *Sickles v. Gloucester Manufacturing Co.*, 1 Fish., 222.

<sup>6</sup> *Imlay v. Norwich & W. R. Co.*, 4 Blatch., 227.

## CHAPTER XVII.

### OF INJUNCTIONS AGAINST THE INFRINGEMENT OF COPY- RIGHTS.

I.	NATURE OF THE RIGHT AND ITS INFRINGEMENT . . . .	§ 988
II.	PRINCIPLES GOVERNING THE JURISDICTION . . . .	1022
III.	DRAMATIC COMPOSITIONS . . . . .	1038
IV.	MUSICAL COMPOSITIONS . . . . .	1053
V.	PARTIES . . . . .	1057

#### I. NATURE OF THE RIGHT AND ITS INFRINGEMENT.

- § 988. Foundation of the jurisdiction; superiority of the equitable remedy.
- 989. Jurisdiction of the courts, federal and state; statutory and common law right.
- 990. Strict compliance with statutory conditions necessary.
- 991. When title protected.
- 992. Right incorporeal; purchaser of plate enjoined from printing therefrom.
- 993. Absolute originality in plaintiff's work not essential.
- 994. Subsequent writer must go to common sources; city directories.
- 995. Work partly mechanical protected; printed diary.
- 996. Statistical tables; acknowledging source.
- 997. Effect of contract between author and publisher.
- 998. Restrictive covenant by author.
- 999. Artist in government employ.
- 1000. Copy of painting; engraving; etchings.
- 1001. English copyright includes illustrations.
- 1002. Law reports protected by injunction in England.
- 1003. The American doctrine.
- 1004. Doctrine as to extracts.
- 1005. Maps and charts; court calendar.
- 1006. Nature of selections; their quantity and value.
- 1007. Arrangement; citations; authorities.
- 1008. Doctrine as to abridgments.
- 1009. Distinction between compilation and abridgment; piracy of part enjoined.

- § 1010. How far compilation protected; abridgment of law reports.
- 1011. Unpublished manuscripts protected.
- 1012. Publication of private letters enjoined.
- 1013. Scientific lectures; system of instruction.
- 1014. Publication of magazine.
- 1015. Libelous publications, conflict of authority.
- 1016. Translations.
- 1017. Readings, recitations and plays derived from original work.
- 1018. Newspaper; descriptive advertisement.
- 1019. Representing defendant's work as that of plaintiff.
- 1020. Copyright in part of book protected.
- 1021. Accounting incidental to injunction.

§ 988. The preventive jurisdiction of equity as exercised by the remedy of injunction in restraining the infringement of copyrights, as in cases of the infringement of patents, rests in the necessity of preventing irreparable mischief and vexatious litigation, and of extending better protection to the rights of authors and their representatives than can be had by the process of courts of law.<sup>1</sup> The jurisdiction is exercised for the purpose of making effectual the legal right, which can not be done by an action for damages, and equity therefore interferes to render such right effective by enjoining the publication of the infringing work.<sup>2</sup> Indeed, a court of equity is manifestly the better forum for the protection of a copyright, since a court of law can not afford as ample redress, either for the past violation of the right, or for the prevention of a threatened or anticipated violation in the future. A court of law can neither compel a discovery of sales, nor an accounting as to such sales, nor can it prevent a multiplicity of suits, which is effected by the proceeding in equity; while equity has undoubted jurisdiction over a bill for an injunction and an accounting for the protection of a copyright, and may restrain a future violation, as well as require an account for past infringement.<sup>3</sup>

<sup>1</sup> 2 Story's Eq., § 930; Saunders v. Smith, 3 Myl. & Cr., 728; Wilkins v. Aiken, 17 Ves., 422.

<sup>2</sup> Wilkins v. Aiken, 17 Ves., 422.

<sup>3</sup> Pierpont v. Fowle, 2 Woodb. & M., 23. As to the right to a forfeiture of copies under the English statutes, upon a bill to restrain an



§ 989. In this country the jurisdiction for the protection of statutory copyright is exercised exclusively by the United States courts. The circuit courts of the United States are invested with original jurisdiction of all suits, either at law or in equity, which arise under the copyright laws, and this jurisdiction is in no manner dependent upon either the citizenship of the parties, or the amount involved in the controversy.<sup>1</sup> Express jurisdiction is also conferred to restrain by bill in equity the infringement of copyrights,<sup>2</sup> and the power thus lodged in the courts of the United States is treated as exclusive in all cases where judicial protection is invoked in aid of the statutory right.<sup>3</sup> The common law right, however, or the right of literary property which every author has in his manuscript prior to its publication, when the common law right becomes merged in the statutory one,<sup>4</sup> may be enforced and protected in the state courts; or, if, the requisite conditions of citizenship exist, in the courts of the United States.<sup>5</sup> The distinction between the two rights, that by common law and the statutory right, is clearly defined, and an author has an unquestioned property in his works until publication, by the common law, in which right he will be protected. And in this sense the statutes governing the subject of copyright

infringement of copyright, see *Colburn v. Simms*, 2 Hare, 543.

<sup>1</sup>Section 629 of the Revised Statutes of 1874 enacts as follows: "The circuit courts shall have original jurisdiction as follows: \* \* \* Ninth, of all suits at law or in equity arising under the patent or copyright laws of the United States."

<sup>2</sup>Section 4970 of the Revised Statutes of 1874 provides that "The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity filed by any party aggrieved, to grant injunc-

tions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable."

<sup>3</sup>Upon the subject of the jurisdiction of the United States courts in copyright cases, consult the scholarly and exhaustive treatise of Mr. Drone on the Law of Copyright, page 544 *et seq.* See also *Dudley v. Mayhew*, 3 N. Y., 9.

<sup>4</sup>See *Millar v. Taylor*, 4 Burr., 2303; *Wheaton v. Peters*, 8 Pet., 591.

<sup>5</sup>Drone on Copyright, 546.

are, to a certain extent, ancillary to the common law right, continuing such right after the publication is in print, but in no manner impairing it while the literary composition remains in manuscript.<sup>1</sup>

§ 990. The first and one of the most essential requisites to relief by injunction, in cases of infringement of copyright, is a strict compliance on the part of the author or proprietor seeking relief with the conditions prescribed by statute as necessary to the vesting of the right. These conditions, under the present statute, include the filing of a printed copy of the title page with the Librarian of Congress in advance of publication; the transmittal to the Librarian of two printed copies within ten days after publication, and the printing of a notice of the entry upon the title page or succeeding page.<sup>2</sup> Substantially similar con-

<sup>1</sup> *Millar v. Taylor*, 4 Burr., 2303; *Wheaton v. Peters*, 8 Pet., 591; *Woolsey v. Judd*, 4 Duer, 389; *Boucicault v. Wood*, 16 Am. Law Reg., 539; S. C., 2 Biss., 34. And see *Keane v. Wheatley*, 9 Am. Law Reg., 33.

<sup>2</sup> The provisions of the Revised Statutes of 1874 upon this point are as follows: "Sec. 4956. No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress or deposit in the mail, addressed to the Librarian of Congress at Washington, District of Columbia, a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design for a work of the fine arts, for which he desires a copyright; nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian of Congress or deposit in the mail, addressed to the Li-

brarian of Congress, at Washington, District of Columbia, two copies of such copyright book or other article, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same. Sec. 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of Congress in the year —, by A. B., in the office

ditions were imposed by the various acts of Congress which had been previously passed, regulating the subject of copyright, and a uniform construction has always been given to these provisions. That construction is, that the conditions imposed are not merely directory, but that they are indispensable prerequisites to the creation of any copyright or the vesting of any title under the statute, and that their strict performance is absolutely essential to warrant relief in equity by injunction against the infringement.<sup>1</sup> And a

of the Librarian of Congress at Washington.' ” .

<sup>1</sup> *Wheaton v. Peters*, 8 Pet., 591; *Jollie v. Jaques*, 1 Blatch., 618; *Baker v. Taylor*, 2 Blatch., 82; *Struve v. Schwedler*, 4 Blatch., 23; *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932; *Parkinson v. Laselle*, 3 Sawy., 330. And see *Callaghan v. Myers*, 128 U. S., 617. *Wheaton v. Peters* was decided under the statutes of 1790 and of 1802. The act of 1790 required the deposit of a printed copy of the title with the clerk in advance of publication; publication of a copy of the record thereof within two months thereafter in one or more newspapers for four weeks; and delivery of a copy of the book to the Secretary of State of the United States, within six months after publication. 1 U. S. Statutes at Large, 125. The act of 1802 imposed as an additional condition the printing of the notice of entry of copyright on the title page or on the succeeding page. Construing these statutes and the conditions which they imposed, the court in *Wheaton v. Peters*, 8 Pet., 663, use this language: “But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But

whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature we can learn only by their official acts. Judging, then, of these acts by this rule, we are not at liberty to say they are unimportant and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance? But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and, consequently, their performance is essential to a perfect title. \* \* \* The rule by which conditions, precedent and subsequent, are construed, in a grant, can have no application to the case under consideration, as every requisite in both acts is essential to the title.” Accordingly, the case was remanded to the circuit court to order an issue of fact to be tried by a jury, to determine whether, within two months after recording the title in the clerk’s office, a copy of the record thereof

bill to enjoin an infringement of copyright is, therefore, demurrable which fails to aver a performance of these conditions.<sup>1</sup> But a mistake of a year in the notice of entry required to be printed upon the title page, or the succeeding page, as by printing 1866 for 1867, the latter being the actual year of the entry, will be regarded as immaterial and as constituting no bar to an injunction.<sup>2</sup> But under the English copyright act it is held that errors in the date of registration of the entry and in the name of the publishers, although technical objections, nevertheless constitute sufficient ground for sustaining a demurrer to a bill for injunction against an infringement of copyright.<sup>3</sup> Nor can a plaintiff maintain a bill to restrain the piracy of his publication, under the English statute, unless he has duly registered it in accordance with the provisions of the act.<sup>4</sup> And it would seem, under the English copyright acts, that the protection afforded by the statute extends only from the first publication, and not from the registration of the title.<sup>5</sup>

§ 991. The right which is secured and protected by the copyright law being the property in the literary composition itself, that is the property in the product of the mind and genius of the author, and the title of the work being ordinarily a mere appendage, equity will not interfere by injunction for the protection of a title alone, separate and distinct from the book itself of which it forms a part or an appendage.<sup>6</sup> Where, however, one publishes a book under

was published in one or more newspapers for four weeks; and whether a copy was delivered to the Secretary of State after publication, in the manner prescribed.

<sup>1</sup> *Parkinson v. Laselle*, 3 Sawy., 380.

<sup>2</sup> *Callaghan v. Myers*, 128 U. S., 617. The contrary doctrine had been held in *Baker v. Taylor*, 2 Blatch., 82.

<sup>3</sup> *Low v. Routledge*, 38 L. J. N. S. Ch., 717; *Mathieson v. Harrod*, L. R. 7 Eq., 270.

<sup>4</sup> *Murray v. Bogue*, 1 Drew., 358.

<sup>5</sup> *Correspondent Newspaper Co. v. Saunders*, 12 L. T. N. S., 540.

<sup>6</sup> *Osgood v. Allen*, 1 Holmes, 185; *Jollie v. Jaques*, 1 Blatch., 627. *Osgood v. Allen* was an action to enjoin defendant from the use of the words, "Our Young Folks," as the title of a publication in which plaintiff claimed copyright, he having published a copyrighted periodical under that name, and defendant publishing a periodical under the name, "Our Young

a particular name or title, the name forming a part of the book, it has been held proper to enjoin another person from

Folks' Illustrated Paper." The relief was denied under the copyright laws, the question whether plaintiff's title might be protected as a trade mark being reserved until the master's report upon that point. Shepley, J., says, p. 192: "By the plain terms of the statute the copyright protected is the copyright in 'the book,' the word 'book' being used to describe any literary composition. Although a printed copy of the title of such book is required, before the publication, to be sent to the Librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected under the statute until the required copies of such copyrighted book are, after publication, also sent. It is only as a part of the book, and as a title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere append-

age, which only identifies, and frequently does not in any way describe the literary composition itself, or represent its character.

By publishing in accordance with the requirements of the copyright law a book under the title of the life of any distinguished statesman, jurist or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the material composition itself, in protecting the other portions of the literary composition courts would probably also protect the title. But no case can be found, either in England or this country, in which under the law of copyright courts have protected the title alone, separate from the book which it is used to designate. In *Jollie v. Jaques*, 1 Blatch., 627, Mr. Justice Nelson says: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is as to how the question might be decided in case of a valid copyright of a book and an infringement of the title by defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion that when the book fails

using the same name.<sup>1</sup> And a title may be protected by injunction against a fraudulent or colorable imitation, made with intent to deceive the public and to mislead them into buying defendant's publication, under the belief that it is that of plaintiff, the relief, however, in such cases being granted upon general principles of equity and independent of copyright.<sup>2</sup>

§ 992. It is also to be observed that the right of the author which is protected by the copyright law is an incorporeal right existing entirely independent of the mechanical appliances for producing the given publication. Thus, the ownership of the plate upon which a map is printed by the owner of the copyright does not carry with it the right of printing and publishing the map itself, the incorporeal right of the author, that is his copyright, subsisting wholly independent of the plate upon which the map is printed. Where, therefore, such plate is sold on execution, the purchaser is not at liberty to print maps therefrom, and the owner of the copyright may, notwithstanding such sale of the plate, enjoin the sale of maps printed therefrom by the purchaser; since the copyright in the map and the plate upon which the map is printed are distinct subjects of property, each capable of existing and of being transferred independent of the other.<sup>3</sup>

§ 993. As regards the nature of the work which it is sought to protect by injunction, it is not essential that absolute originality should be shown, and equity may lend its aid for the protection of a book which is drawn from com-

to be protected the title goes with it, would seem clearly to point to a similar result in a case of alleged infringement of the copyright of the book, namely: that if there was no piracy of the copyrighted book, there could be no remedy under the act for the use of a title which could not be copyrighted independently of the book."

<sup>1</sup> *Weldon v. Dicks*, 10 Ch. D.,

247. See *Bradbury v. Beeton*, 39 L. J. Ch. N. S., 57. See also *Mack v. Petter*, L. R. 14 Eq., 481.

<sup>2</sup> *Chappell v. Sheard*, 2 Kay & J., 117; S. C., 1 Jur. N. S., 996, 3 W. R., 646; *Chappell v. Davidson*, 2 Kay & J., 123; S. C. on appeal, 8 DeG., M. & G., 1; *Matsell v. Flanagan*, 2 Ab. Pr. N. S., 459.

<sup>3</sup> *Stevens v. Gladding*, 17 How., 447.

mon sources of information. Thus, the author of a work of a scientific nature, such as a treatise upon grammar, who takes existing materials from common sources open to all writers and arranges and combines them in a new form, giving them an application which was unknown before and exercising selection, arrangement and combination in producing his work, is entitled to the aid of equity to restrain an infringement. And where, in such a case, the author of the work which it is sought to enjoin, instead of going to the original sources of information which are open and common to all, contents himself with copying from and adopting the plan of plaintiff's book, a proper case is presented for relief by injunction.<sup>1</sup> Upon similar principles it is held where defendant, in the preparation of a dictionary, has made considerable use of plaintiff's dictionary in common with others, but has also bestowed his own labor upon his book and has produced a new result and a different work from that of plaintiff, by the use of his own mental labor, and where there is nothing tending to show any fraudulent design upon the part of defendant to make an unfair use of plaintiff's work, that an injunction should not be allowed.<sup>2</sup>

§ 994. It is a fundamental principle of the law of copyright that, although the sources from which an author derives his information and procures the material for his literary work are public and open to all writers in common, a subsequent writer is not, therefore, justified in availing himself of the labors of his predecessor in the same field, and making a servile or colorable imitation of his work, but must himself go to the original sources of information which are common to all.<sup>3</sup> This doctrine is especially applicable to such works as business or city directories, the information necessary for their preparation being open to all, yet a subsequent compiler being restrained from a serv-

<sup>1</sup> *Greene v. Bishop*, 1 Clif., 186.

<sup>2</sup> *Spiers v. Brown*, 6 W. R., 352.

<sup>3</sup> *Drone on Copyright*, 416, 417; *Farmer v. Elstner*, 33 Fed. Rep., 494.

ile imitation or use of the labors of his predecessor in the same field; and the preventive jurisdiction of equity in this class of cases is freely exercised.<sup>1</sup> Where, therefore, defendant has not compiled or prepared his directory by the legitimate application of his own labor and original investigation, but has merely made a servile use of plaintiff's work, he is guilty of such an infringement as will be restrained by injunction, since the fact that the information is public to all inquirers will not justify defendant in availing himself of plaintiff's labor for the purpose of saving himself the trouble and expense of procuring the same information from the original sources.<sup>2</sup> And the injunction will go in such case, even though defendant has partially verified the materials taken from plaintiff's directory by personal investigation.<sup>3</sup> So when defendant, in the preparation of a business or trades directory of a city, uses plaintiff's di-

<sup>1</sup> *Kelly v. Morris*, L. R. 1 Eq., 697; *Kelly v. Hooper*, 1 Y. & C. C. C., 197; *Morris v. Ashbee*, L. R. 7 Eq., 34; *Matthewson v. Stockdale*, 12 Ves., 270. *Matthewson v. Stockdale* was a bill for an injunction to restrain an infringement of the copyright of an East India calendar or directory, on the ground that the variations from the original were merely colorable. It being objected that the work was not susceptible of copyright, Lord Erskine, in granting the injunction, said that in the case of Dr. Trusler's chronology, "all the remarkable events, the accounts of eminent persons, every matter of curiosity and interest, were subjects of information past and gone by, which could not be altered. All human events are equally open to all. Dr. Trusler finally had the decision in his favor. The next was a case of a map. How is it possible to have a copyright in the Island of St.

Domingo? Must not the mountains have the same position, the rivers the same course? The answer was that the subject of the plaintiff's claim was a map, made at great expense, from actual surveys. The defendant's map was a servile imitation. In the case of the chart of the English Channel, must not the latitude and longitude of the several points upon the adjoining shores and the soundings be the same as they were placed by nature? They must be the same, or the chart must destroy the mariner. What room then can there be for originality? That may be a reason for not making a new chart, but it is no reason for a servile imitation."

<sup>2</sup> *Kelly v. Morris*, L. R. 1 Eq., 697.

<sup>3</sup> *Kelly v. Morris*, L. R. 1 Eq., 697; *Morris v. Ashbee*, L. R. 7 Eq., 34.



rectory as the source from which to compile material parts of his own, making the results arrived at by plaintiff the foundation of a material portion of his own book, sufficient cause is presented for an injunction. And in such case, the fact that certain persons had paid plaintiff for the insertion of their names in conspicuous letters in his directory, or with added or extra lines, does not render the names thus inserted common property or sanction their use by defendant in his directory.<sup>1</sup> So the publisher and proprietor of a directory may enjoin the sale of an almanac, the principal part of which is taken from plaintiff's directory, although the matter thus taken by defendant consists of information concerning the post office, which might be obtained by any person applying for the same. And the injunction is proper in such case, although the matter pirated forms but a small part of plaintiff's work, when it bears a large proportion to the whole of defendant's book.<sup>2</sup>

§ 995. It is not essential that the work for which protection is invoked should be of a strictly literary nature, and relief has been allowed against the piracy of copyright in a production partly literary and partly mechanical. Thus, where plaintiff's publication consisted of a printed diary interleaved with blank sheets so arranged as to give a blank space for writing opposite each day in the diary, and underneath each date a verse of Scripture, to which work plaintiff had given a particular name, defendant was

<sup>1</sup> *Morris v. Ashbee*, L. R. 7 Eq., 34. But the court refused to extend the injunction to advertisements which appeared at the end or upon separate pages of plaintiff's work, as distinct from the list of names in the body of the work.

<sup>2</sup> *Kelly v. Hooper*, 1 Y. & C. C. C., 197. But in *Morris v. Wright*, L. R. 5 Ch., 279, the court inclined to the opinion that the compiler of a city directory might use slips cut from plaintiff's directory for the

purpose of directing him to the persons from whom the information was to be obtained; in other words, that the use by defendant of plaintiff's book as a guide to the persons on whom he should call in the preparation of his directory, and for no other purpose, was a legitimate use which would not be restrained. But it may well be doubted, in the light of the principles stated in the text, whether such relaxation of the doctrine can

enjoined from publishing and selling a book which was a mere colorable imitation of that of plaintiff.<sup>1</sup>

§ 996. Where defendant's book consists of statistical tables taken bodily from plaintiff's work, without the exercise of that labor which plaintiff had himself used in producing the tables originally, such use will not be regarded as a fair and legitimate use of the labors of a predecessor in the same field, but will be treated as an infringement for which an injunction will lie. And in such a case, the fact that defendant gives full and complete acknowledgment in his book of the source from which such statistics are drawn will not avail against the granting of an injunction, since the court can only look at the result of the infringement as affecting the property right of plaintiff, and not upon defendant's motive or intention.<sup>2</sup> And when defendant's book has been made largely by taking the actual words as they stand in plaintiff's work, an injunction will be allowed.<sup>3</sup>

§ 997. The nature of plaintiff's right and the extent to which it is entitled to protection are frequently dependent

be supported, either upon principle or authority.

<sup>1</sup> Mack v. Petter, L. R. 14 Eq., 431.

<sup>2</sup> Scott v. Stanford, L. R. 3 Eq., 718. Vice Chancellor Wood observes, p. 723: "It is urged that this is a case in which no *animus furandi* can be found on the part of Mr. Hunt, who has taken these statistics in perfect good faith, and with the fullest acknowledgment in his book of the sources from which they are derived. But if, in effect, the great bulk of plaintiff's publication, a large and vital portion of his work and labor, has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the court can

only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects. \* \* \* The defendant, after collecting the information for himself, might have checked his results by the plaintiff's tables, but that is a widely different thing from this wholesale extraction of the vital part of his work. No man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

<sup>3</sup> Stevens v. Wildy, 19 L. J. N. S. Ch., 190.

upon the contract relations or obligations which he may have assumed, and in such cases reference must be had to the contract in determining whether a proper case for relief by injunction is shown. Thus, where an author enters into a verbal agreement with a publisher for the publication of his book at the author's expense, he being reimbursed by a royalty upon the sales, but there being no transfer of the copyright and no agreement with the publisher of an exclusive nature, or restricting the author from publishing another edition, an injunction will not lie to prevent the author from publishing another edition until such publisher shall have sold all of his copies.<sup>1</sup> And where a contract was entered into between an author and publishers whereby the latter were to print a first edition of a given number of copies, and to print as many copies of a second edition, if called for, as they could sell, and the publishers printed such second edition, and afterward printed from the same plates what they called a third edition, the court, construing the contract to authorize them to print as many as they could sell, refused to enjoin them from further printing or publishing; and also refused, upon a cross-bill by defendants, to enjoin the author from publishing a revised edition of the work.<sup>2</sup>

§ 998. It is also held, where plaintiffs purchase the copyright in a periodical published by defendant, with the right to use his name in connection therewith, or with any of their present or future publications, he agreeing to give his entire time and services in and about such publication, and not to engage in any other business without plaintiff's con-

<sup>1</sup> *Warne v. Routledge*, L. R. 18 Eq., 497.

<sup>2</sup> *Pulte v. Derby*, 5 McLean, 328. It is difficult to ascertain from the opinion the exact grounds of the decision, or whether the case did not go off upon a question of jurisdiction; since the court discuss the question of jurisdiction, and ex-

press the opinion that, the controversy being solely with reference to the construction of the contract between the parties, and not a controversy arising under the act of Congress relating to copyrights, the United States Circuit Court had no jurisdiction.

sent, or to permit the use of his name for any other publication without their consent, that an injunction will lie to prevent defendant from advertising or announcing the publication of a rival work without plaintiff's consent.<sup>1</sup> Where, however, plaintiff had purchased of defendant the copyright of a treatise upon criminal law written by defendant, who undertook not to write or edit any other work upon that subject, an advertisement having appeared announcing that defendant was about to edit a book called "Burn's Justice," the court refused to enjoin him from editing such of the articles in that work as related to the criminal law; the refusal being based upon the ground that defendant was at liberty to write what he pleased, until there was a violation of the agreement by actual printing and publication.<sup>2</sup>

§ 999. As still further illustrating the effect to be given to the contract obligations of one who seeks protection under the copyright laws, it is held that one who accompanies a government expedition, in the employ of the government for the purpose of making drawings and sketches, under an agreement that such drawings shall be the exclusive property of the government, the results of his labors being published by the government in a report of the expedition, can not procure a copyright thereon as his individual property, and can not enjoin the publication of such sketches by a publisher. Even if plaintiff, in such a case, could obtain a copyright for his sketches, yet when he has aided defendants in the publication of their work, being employed and paid by them to prepare some of their prints for publication, and making no claim of copyright therein, he can not afterward enjoin defendants from such publication.<sup>3</sup>

<sup>1</sup> Ward v. Beeton, L. R. 19 Eq., 207.

<sup>2</sup> Brooke v. Chitty, 2 Coop. t. Cottingham, 216.

<sup>3</sup> Heine v. Appleton, 4 Blatch.,

125. Ingersoll, J., says, p. 128:

"At a subsequent period the plaintiff was employed by the defendants to reduce several drawings from the size of the quarto

§ 1000. The unauthorized copying of a painting by taking photographs therefrom and selling them constitutes such a violation of the common law right of the owner as to warrant relief by injunction. And in such a case, the fact that the owner has previously consented to and permitted the publication in a magazine of an engraving from the painting does not constitute such a publication as to prevent relief in equity. Nor does the exhibition of the painting at a public gallery or for the purpose of obtaining subscribers amount to such publication as will bar the right to relief by injunction.<sup>1</sup> But the exhibition of a diorama copied on a large scale from plaintiff's print or engraving has been held not to be sufficient ground to warrant an injunction until plaintiff's right could be established at law.<sup>2</sup> Where, however, plaintiff has made drawings and etchings and has printed impressions of them for his own private use and pleasure, not intending them for publication, and defendants surreptitiously obtain them and publish a catalogue for sale, an injunction will be allowed against such publication. And in such case the right to relief rests upon the double ground of an exclusive property in plaintiff with no right or interest in defendants, and upon the ground of breach of trust or confidence in obtaining possession of the etchings; and the injunction is proper, under such circumstances,

edition to that of the octavo edition, for which services he was paid by the defendants, and there is no complaint that he never was paid. The plaintiff thus aided in the publication of some of the works of the defendants. When he thus aided in their publication he made no claim of copyright. It would be inequitable now to permit him, when he has been paid to aid in their publication and sale, and has thus aided in their publication with a view to their sale, to stop their sale, even if he had a

valid copyright in them. By aiding in their publication he agreed to their publication; and by agreeing that they might be published he agreed that they might be sold; and he can not now, with success, ask that the defendants may be restrained from doing that which he has agreed they may do. The motion for the preliminary injunction must, therefore, be denied."

<sup>1</sup> *Turner v. Robinson*, 10 Ir. Ch., 121.

<sup>2</sup> *Martin v. Wright*, 6 Sim., 297.

without a trial of the right at law.<sup>1</sup> And upon similar grounds, a photographer, who has taken photographs for a customer in the usual course of business, retaining the negative in his possession, may be restrained from selling or exhibiting for sale, without the customer's consent, copies of such photographs.<sup>2</sup>

§ 1001. Under the English statute,<sup>3</sup> it is held that where there are designs or illustrations forming part of a book in which plaintiff has a copyright, such copyright extends to the illustrations as well as to the letter-press; and plaintiff may, therefore, have an injunction to restrain defendant from publishing copies of such designs, although defendant's letter-press is different from that of plaintiff and is original. And the relief will be allowed in such a case, although plaintiff has not copyrighted his designs as such under the statute; since the book includes every design, print or engraving which forms a part of it, as well as the letter-press.<sup>4</sup>

§ 1002. The question whether there may be such literary property in the work of a reporter who prepares and publishes the reports of judicial decisions of the courts as to entitle him to a copyright therein, and to the protection of equity by enjoining an infringement upon his work, seems to be settled in the affirmative in England; and there are repeated instances of relief by injunction in such cases in that country.<sup>5</sup> Thus, where plaintiff and defendant were proprietors of two rival legal publications or journals, each of which contained, among other things, reports of cases at law and in equity reported by members of the bar under verbal agreements with the proprietors, plaintiff's journal being copyrighted, they were allowed an injunction to restrain defendant from printing or selling any copies of his

<sup>1</sup> Prince Albert v. Strange, 1 Mac. & G., 25; S. C., 2 DeG. & Sm., 652.

<sup>2</sup> Pollard v. Photographic Co., 40 Ch. D., 345.

<sup>3</sup> 5 & 6 Vict., Ch. 45.

<sup>4</sup> Bogue v. Houlston, 5 DeG. & Sm., 267.

<sup>5</sup> Sweet v. Shaw, 1 Jur., 917; Sweet v. Maugham, 11 Sim., 51. See also Butterworth v. Robinson, 5 Ves., 709.

journal containing their reports.<sup>1</sup> It is, however, to be observed with reference to the English decisions upon this subject, that the English law reports have been in modern times wholly the result of private enterprise, there having been no official reports of the courts since the year books, the reporters of which were employed and paid by the crown. The work of the reporter, therefore, under such circumstances, being purely of a private nature, and not performed by him in the discharge of a public duty, or in the capacity of a public officer, no satisfactory reason can be perceived why, upon principle as well as authority, his reports should not be subject to copyright and entitled to protection by injunction.

§ 1003. In this country, the tendency of the courts has long been toward a recognition of the right of a reporter of judicial decisions to literary property and a copyright in his reports, and to judicial protection against an infringement of that right.<sup>2</sup> And the doctrine is now definitely and finally established by the Supreme Court of the United States that, in the absence of any legislation reserving a copyright to the state, an official reporter is entitled to copyright his work under the act of Congress, and to protection by injunction against its piracy.<sup>3</sup> The doctrine thus established extends to a reporter the same relief as to any other author, and his right to protection under the act of Congress governing copyrights, and to relief by injunction, is now too well established to admit of controversy.<sup>4</sup> Upon principle, however, it is difficult to perceive

<sup>1</sup> Sweet v. Maugham, 11 Sim., 51.

<sup>2</sup> See Little v. Hall, 18 How., 165; Backus v. Gould, 7 How., 798; Paige v. Banks, 13 Wal., 608, affirming S. C., 7 Blatch., 152; Chase v. Sanborn, 6 Pat. Off. Gazette, 932; Banks v. McDivitt, 13 Blatch., 163.

<sup>3</sup> Callaghan v. Myers, 128 U. S., 617. And see the opinion of the court in this case as to the extent of matter prepared by the reporter

which may be covered by copyright.

<sup>4</sup> Callaghan v. Myers, 128 U. S., 617. The criticism expressed in the text upon the doctrine of protection to an official reporter in the product of his official labors is strengthened by the earlier English decisions, during a period when the publication of the laws was claimed as an attribute of sover-

any satisfactory reason for extending the protection of the copyright laws to an official reporter, occupying the posi-

eignty, and when the exclusive right to their publication was granted under letters patent from the crown. Such patents appear to have been granted from a very early date, and in *The Company of Stationers v. Seymour*, 1 Mod., 257, decided in 1677, the court say: "And particularly the sole printing of law books has been formerly granted in other reigns. \* \* \* Queen Elizabeth, King James and King Charles the First granted such patents as these, and the law has great respect to common usage." The case of *The Stationers v. The Patentees*, decided in 1666, is an instructive case in point. A patent had been granted by James I in 1608 for printing law books, which finally vested in one Atkins. The Company of Stationers printed Roll's Abridgment, and Atkins obtained an injunction in chancery to restrain the printing. On appeal to the House of Lords, it was argued by counsel for the patentee that "The King hath a particular prerogative over law books, and so he would have had if the art of printing had never been known. The reasons are, first, all the laws of England are called the King's laws, etc.; second, the salaries of the judges are paid by the King; and reporters in all courts at Westminster were paid by the King, formerly." And the Lords sustained the patentee under the King's grant. Carter, p. 89; Bac. Abridg., title Prerogative, F. 5. The case of *Roper v. Streater*, decided in 1672, is also in point. Roper had bought of the executors

of Mr. Justice Croke the third part of his reports, which he then printed. Streater held a grant from the crown for printing all law books, and Roper brought an action against him for printing without authority. Streater pleaded the King's grant, to which Roper demurred, and there was judgment for the plaintiff, holding the King's grant not good. But the House of Lords reversed the judgment on writ of error, upon the following, among other grounds: that the privilege of granting patents by the King for the printing of law books had always been allowed; that it concerned the state, and was a matter of public care; and that the King had the making of judges, sergeants and officers of the law. Skinner, 234; Bac. Abridg., title Prerogative, F. 5.

English authorities differ as to the foundation of the right of the sovereign as thus asserted over the publication of the laws, there being two theories upon which the right has been based: first, that it is dependent upon an absolute property in the crown as the head of the state; and, second, that it is a branch of the royal prerogative. Lord Mansfield adhered to the former theory, and in the great case of *Millar v. Taylor*, 4 Burr., 2404, decided in 1769, referring to *Basket v. University of Cambridge*, 1 W. Black., 105, in which the King's Bench had upheld the doctrine of the exclusive right of the crown to publish the laws of the realm, he says: "We rested upon property from the king's right of original



tion of a public officer, and paid by the state or government for his labor in reporting the opinions of the courts. That such a reporter is not entitled to copyright in the opinions of the judges, or to protection by injunction as to such opinions, is clear.<sup>1</sup> Nor can he acquire any copyright in the head notes of the cases when prepared by the judges, nor obtain relief by injunction against their piracy.<sup>2</sup> And the reason for this is found in the fact that the judges being public officers, employed and paid by the people whom they

publication. Acts of parliament are the works of the legislature; and the publication of them has always belonged to the king as the exclusive part and as the head and sovereign."

Upon the other hand, Mr. Justice Yates, in *Millar v. Taylor*, 4 Burr., 2383, asserted in strong terms the prerogative theory as the basis of the right in question. "Upon the whole of this prerogative claim of the crown," he observes, "it appears to me that the right of the crown to the sole and exclusive printing of what is called prerogative copies, is founded on reasons of religion or of state. The only consequence to which they tend are of a national and public concern, respecting the established religion or government of the kingdom; and have no analogy to the case of private authors."

Lord Chancellor Lyndhurst, in *Manners v. Blair*, 3 Bligh, N. S., 402, which was a case involving a patent from the crown of the exclusive printing of bibles, also adopts the prerogative theory, and attributes the power of the crown over the publication of the laws and of the bible, "to the character of the duty imposed upon the chief executive officer of the government

to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded — that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative."

Whether the theory of the royal prerogative, or that of a private property in the crown, be accepted as the foundation of this exclusive right of publishing the laws of England, the application by analogy to the publication of law reports is certainly a striking one, and one which has generally been overlooked. In view, however, of the doctrine of the Supreme Court in *Callaghan v. Myers*, 128 U. S., 617, already noted, the subject is chiefly interesting in a historical rather than in a practical view.

<sup>1</sup> *Wheaton v. Peters*, 8 Pet., 591. "It may be proper to remark," say the court, p. 668, "that the court are unanimously of opinion that no reporter has, or can have, any copyright in the written opinions delivered by this court, and that the judges thereof can not confer on any reporter any such right."

<sup>2</sup> *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932.

serve, the opinions delivered by them in the discharge of their official duty are public property, and are not, therefore, subject to copyright, unless in the name or for the benefit of the public, whose property they are. That, upon principle, the same doctrine should govern as regards the work of an official reporter, would seem to be clear. But although the opinions of the judges are not susceptible of copyright, yet where, under a contract with the proper state officers, made under the laws of the state, a publisher is entitled to the exclusive benefit of the copyright of the notes, references and other matters susceptible of copyright, in the reports of the state, equity will enjoin other publishers from infringing upon this right. And this will be done even though the copyright be taken in the name of the state. Even an acknowledgment of the extracts in such case affords no justification for the piracy.<sup>1</sup>

§ 1004. As regards the nature and extent of the infringement which will warrant relief by injunction, it is held that a fair extract from plaintiff's publication, used for purposes of criticism, does not constitute such a piracy of plaintiff's literary property as to warrant an injunction.<sup>2</sup> But if so much of the original is taken as to sensibly diminish its value, or if there is a substantial and injurious appropriation of complainant's labors, the relief will be allowed.<sup>3</sup> So the proprietor of a newspaper may be enjoined from publishing in his paper copious extracts from a novel which are copied without criticism.<sup>4</sup> And it is not necessary, to warrant the interference of equity, that defendant's work should be a substitute for complainant's. It is only required that so much should be abstracted as to sensibly impair and diminish the value of the original.<sup>5</sup>

§ 1005. Where the natural objects from which a work is produced are equally open to all, as in the case of a map or

<sup>1</sup> *Little v. Gould*, 2 Blatch., 165.

<sup>2</sup> *Bell v. Whitehead*, 3 Jur., 68.

<sup>3</sup> *Folsom v. Marsh*, 2 Story's R.,

<sup>4</sup> *Dickens v. —*, cited 8 L. J.

Ch. N. S., 141.

<sup>5</sup> *Bohn v. Bogue*, 10 Jur., 420.

chart, the copyright is violated only when a servile imitation is made. In all such cases, absolute originality being of necessity excluded, the compiler may properly make use of preceding works upon the same subjects, by bestowing upon the materials thus taken such mental labor, and subjecting them to such revision as to produce an original result, the alterations being not merely colorable, and the compiler not denying the use made of preceding works.<sup>1</sup>

<sup>1</sup>Blunt v. Patten, 2 Paine, 397; Farmer v. Calvert L. E. & M. P. Co., 5 Chicago Legal News, 1. The latter case, decided in the United States Circuit Court for the Eastern District of Michigan, very clearly illustrates the rule laid down in the text. The decision was upon a motion to dissolve a preliminary injunction restraining defendant from the infringement of certain maps of the states of Michigan and Wisconsin. The following observations of the court, Longyear, J., are especially applicable to the point under consideration: \* \* \*

"The courts, in the interest of learning and science, have at all times and in all countries recognized the right of subsequent authors, compilers and publishers to use the works of others to a certain extent; but the great difficulty has always been, and always must be, to determine where such use ceases to be legitimate, and becomes an invasion of the rights of others. The difficulty is greatest in cases of maps, and the like, in which there is not, and can not be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all. The following rule laid down by Mr. Copinger (Copinger's Law of Copyright, 91),

comes as near to defining this right as anything I have been able to find or can invent. He says: 'The rule appears now to be settled that a compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction as to produce an original result; provided, that he does not deny the use made of such preceding works and the alterations are not merely colorable.' To apply this rule to the present case: What mental labor did the defendant bestow upon those portions of the complainant's map admitted to have been taken in the preparation of its own, viz: the boundaries of the larger townships of Wisconsin? None whatever beyond the mere mechanical operation of reducing them from the larger scale of complainant's to the smaller scale of defendant's map. Neither does it appear that there was any revision whatever to ascertain if there were errors which needed correction, or for any other purpose. There is in fact nothing whatever to bring the case within the rule. So far as those bound-

But the court will interpose to restrain the piracy of a court calendar, the individual work being regarded as a proper subject of copyright, although the general subject, as in the case of a chart or map, is open to all.<sup>1</sup>

§ 1006. Although the question as to the originality of the work which it is sought to enjoin generally turns upon the extent to which the materials of the prior publication have been used and the quantity abstracted, yet resort must frequently be had to the nature and objects of the selections, as well as their quantity.<sup>2</sup> And the question of the

aries are concerned it is clearly a case of naked piracy. But it is contended that boundaries of townships are not a legitimate subject of copyright—that they are fixed and defined by statute law, and that the marking of them down upon paper is but a transcription in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all. But no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper. The defendant no doubt had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map (which of course it would have been if they were both correct). But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by com-

plainant's affidavit, these boundaries were fixed by the boards of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it would have been if such boundaries could have been ascertained from the statutes of the state."

<sup>1</sup> *Longman v. Winchester*, 16 Ves., 269.

<sup>2</sup> *Folsom v. Marsh*, 2 Story's R., 100. The considerations to be observed in determining the question of piracy are stated in this case by Story, J., as follows: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and can not fairly be treated

value of the materials abstracted must also be taken into consideration, since, although the parts taken may comprise but a small portion of the original work in quantity, they may nevertheless constitute its chief value.<sup>1</sup>

§ 1007. Although one may use the same materials as his predecessor, and derive them from the same source, yet if, availing himself of his labor, he should adopt his arrangement of those materials, he would be guilty of such an infringement as would warrant the interference of equity, even though the new work should be disguised under a colorable variation from the old.<sup>2</sup> So while extracts may be made for purposes of criticism, comment, review or illustration, if done in good faith, yet if the citations go so far as to supersede the original work, and to substitute therefor the later one, equity may properly interfere.<sup>3</sup> And the true

as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume."

<sup>1</sup> *Bramwell v. Halcomb*, 3 Myl. & Cr., 738; *Gray v. Russell*, 1 Story's R., 11; *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Legal News, 1.

<sup>2</sup> *Jarrold v. Houlston*, 3 Kay & J., 708; *Hotten v. Arthur*, 1 Hem. & M., 603; *Gray v. Russell*, 1 Story's R., 11.

<sup>3</sup> *Wilkins v. Aikin*, 17 Ves., 422. In this case defendant admitted by his answer that he had copied por-

tions of complainant's work, representing them as fair quotation and abridgment, and admitted that he had copied from some of complainant's drawings. He insisted, however, that his work was a distinct work and not merely an abridgment of that of complainant, and that the abridgments and quotations constituted only a small portion of the work. Eldon, Chancellor, says: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which can not be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to the publications which go out to the world, to the plaintiff's prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether; and accordingly in the exercise of this jurisdiction, where a

test is to ascertain whether the plan, arrangement and illustrations of the original work have been used with such

fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried, making some provision in the *interim*, the best that can be, for the benefit of both parties. There is no doubt that a man can not, under the pretense of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases difficult to define, fair quotation. Difficulties have arisen in cases that have occurred upon which I should have taken the same course by sending them to the consideration of a court of law. In the case of maps, for instance, one man publishes the map of a county; another man, with the same design, if he has equal skill and opportunity, will, by his own labor, produce almost a *fac simile*, and has a right to do so; but from his right through that medium was it ever contended that he might copy the other map? Suppose a publication professing to be an account of the improvement of maps of the county of Middlesex, compiling the history of all the maps of it ever published; pointing out the peculiarities belonging to them, and giving copies of them all, as well those, the copyright of which have expired, as those of which it was subsisting; it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the publication of the individual map was merely an illustration of that history, that is

one way of stating it; but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore, in these cases make the most important distinction. So in the case of a book of roads, there is no doubt that, though any man may publish a book of roads that would be precisely the same as Patterson's, yet he can not take that book and copy it. The fair question, therefore, upon such a compilation as this, is whether it is competent to the defendant to publish to the world the plates, which it is admitted he could not publish as copies of the plaintiff's. I have no doubt that both these parties are actuated by very honorable views. Upon inspection of the different works I observe a considerable proportion taken from the plaintiffs, that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow, that therefore there is a breach of the legal right; but where that is so, and there is a fair question, the injunction ought not to be dissolved, but according to the usual course, maintaining

colorable alterations as to disguise this use, or whether defendant has simply availed himself of the common sources and materials open alike to all.<sup>1</sup> But an author will not be allowed to prohibit a subsequent writer from using the same authorities quoted in his work, even on proof that such authorities were suggested to the later writer by a perusal of the former work. The subsequent writer, however, will not be allowed to copy the quotations or extracts from the earlier work, but he must go to the same sources from which such extracts were drawn; although the use of a single quotation without verification, or of a single argument deduced from the facts stated by the former author, does not constitute such a piracy as calls for the interference of equity.<sup>2</sup> And when it is shown that those portions of defendant's work which are alleged to be a piracy upon that of plaintiff are in fact taken from other works which preceded both publications, it appearing that defendant's writers, although advised of the existence of plaintiff's book and using it in common with others, have gone to independent sources of information, an injunction will be refused.<sup>3</sup>

§ 1008. It has been held that a *bona fide* abridgment is not such a piracy as equity will restrain.<sup>4</sup> This doctrine must, however, be received with many qualifications, and grave doubts have been entertained both in England and in America, of the correctness of the principle.<sup>5</sup> In order to

the injunction, an action should be brought forthwith. The proper course in this instance will be to permit this work to be sold in the meantime, the defendant undertaking to account according to the result of the action."

<sup>1</sup> *Emerson v. Davies*, 3 Story's R., 793; *Webb v. Powers*, 2 Woodb. & M., 497. And see *Carnan v. Bowles*, 1 Cox, 283; S. C., 2 Bro. C. C., 81.

<sup>2</sup> *Pike v. Nicholas*, 39 L. J. N. S. Ch., 435; S. C., L. R. 5 Ch., 251.

<sup>3</sup> *Jarrold v. Heywood*, 18 W. R., 279.

<sup>4</sup> *Gyles v. Wilcox*, 2 Atk., 141; *Bell v. Walker*, 1 Bro. C. C., 451. And see *Campbell v. Scott*, 11 Sim., 31.

<sup>5</sup> *Gray v. Russell*, 1 Story R., 11; *D'Almaine v. Boosey*, 1 Y. & C. Exch., 288; *Dickens v. Lee*, 8 Jur., 184. And see *Wheaton v. Peters*, 8 Pet., 591.

constitute such an abridgment as will not be a piracy, there must at least be a substantial condensation of the materials used by the original author.<sup>1</sup> And if the condensation be merely colorable, as by the omission of certain parts of the work that the remainder may be presented in a smaller compass, it is still a piracy.<sup>2</sup>

§ 1009. A distinction has been drawn between a compilation and an abridgment, and it has been held that while a fair abridgment may, under certain circumstances, be allowed, yet if the plan and classification of the original work are adopted, and such copious extracts made as to render the new work a mere compilation, equity will interpose. And where part of a book is a piracy, and the remaining portions are not, the injunction will be granted against the pirated matter.<sup>3</sup>

§ 1010. A publication consisting partly of original matter and partly of compilations and selections from former works may be the subject of copyright, and as such entitled to protection in equity. And where a large proportion of defendant's work has been made up from such a publication, with no other labor than that of copying and arranging the matter in such form as suited the compiler, it will be enjoined as an infringement.<sup>4</sup> So upon a bill to enjoin the publication of an abridgment of law reports, the bill alleging defendant's work to be merely a colorable abridgment, omitting some parts of the cases, the chronological order and arrangement of the work being artificially changed to an alphabetical arrangement, under heads and titles, so as to give it the appearance of a new work, an injunction may be allowed.<sup>5</sup>

§ 1011. Closely allied to the jurisdiction of equity in cases of infringement of copyright, is its power to restrain

<sup>1</sup> *Folsom v. Marsh*, 2 Story R., 107.

<sup>2</sup> *Gyles v. Wilcox*, 2 Atk., 141; *Gray v. Russell*, 1 Story R., 11.

<sup>3</sup> *Story's Ex'rs v. Holcombe*, 4 McLean, 306.

<sup>4</sup> *Lewis v. Fullarton*, 2 Beav., 6.

<sup>5</sup> *Butterworth v. Robinson*, 5 Ves., 709.



the publication of unpublished manuscripts, the jurisdiction resting upon the same foundation of the prevention of irreparable mischief and vexatious litigation.<sup>1</sup> The author of manuscript treatises having a right of property therein, it is obvious that he is entitled to protection in the enjoyment of such right, even though his manuscripts may be deposited in the possession of a third person with authority to copy them.<sup>2</sup> And where a copy of an unpublished treatise has been granted to another for a particular purpose, other than publication, such a grant may not be construed into a general authority to publish the work, and equity will, under such circumstances, restrain its publication.<sup>3</sup>

§ 1012. Equity will also restrain the publication of private letters, on the ground of a right of property in the author, it being held that the receiver of the letters acquires only a special property in them, which does not justify their unauthorized publication. Even though the receiver of the letters be considered in the position of a joint owner with the writer, yet his publication of the letters without the writer's consent is such a violation of the rights of literary property as to warrant the exercise of the strong arm of equity for its restraint.<sup>4</sup> It is to be observed, however, that the interference will not be exercised on the ground of wounded feelings, or of violated friendship, but only for the protection of property rights.<sup>5</sup> And the jurisdiction rests upon no broader foundation than that of copyright in the letters as literary productions, or of property in the paper on which they are written, a distinction being observed between letters having the characteristics of literary compositions, and merely friendly or private letters on domestic

<sup>1</sup> 2 Story's Eq., § 943.

<sup>2</sup> 2 Story's Eq., § 943.

<sup>3</sup> *Queensberry v. Shebbeare*, 2 Eden, 329; *Prince Albert v. Strange*, 1 Mac. & G., 25.

<sup>4</sup> *Pope v. Curl*, 2 Atk., 342; *Thompson v. Stanhope*, Amb., 737;

*Gee v. Pritchard*, 2 Swanst., 422; *Granard v. Dunkin*, 1 Ball & B., 207. See also *Perceval v. Phipps*, 2 Ves. & B., 19. And see *Palin v. Gathercole*, 1 Coll., 565.

<sup>5</sup> *Gee v. Pritchard*, 2 Swanst.,

422.

and business affairs. And while the unauthorized publication of the former class will be restrained, on the principles above stated, equity will not interfere with the latter, even though the publication constitutes a gross violation of honor and trust.<sup>1</sup> So it has been held that where the publication of letters would be a violation of a trust or confidence which is founded on contract, the injunction may be allowed.<sup>2</sup> Nor is the exercise of the jurisdiction confined to cases where the relief is sought by the writer of the letters, but the receiver may invoke the aid of equity to restrain their unauthorized publication.<sup>3</sup> But private letters

<sup>1</sup> *Wetmore v. Scovell*, 3 Edw. Ch., 515; *Hoyt v. Mackenzie*, 3 Barb. Ch., 320. And see *Brandreth v. Lance*, 8 Paige, 24. Mr. Justice Story, however, has expressed himself strongly and feelingly in favor of a contrary doctrine, and has sought to sustain the jurisdiction of equity to restrain the publication of merely private and personal letters, lacking the attributes of literary compositions, on the ground of wounded feelings and injured confidence. See 2 Story's Eq., §§ 946, 947, 948. See also *Folsom v. Marsh*, 2 Story R., 100. But, while we must agree with this learned commentator, that "in a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined," yet the weight of authority is clearly opposed to the exercise of the jurisdiction on such grounds. With the exception of *Woolsey v. Judd*,

4 Duer, 389, 11 How. Pr., 49, and *Eyre v. Higbee*, 35 Barb., 502, 22 How. Pr., 198, neither of which cases was in a court of last resort, it is believed that no decisions, English or American, can be found to sustain the doctrine of Mr. Justice Story. Even the cases cited would seem to rest largely upon the foundation of literary property. The doctrine as stated in the text has the sanction of an unbroken current of authority, beginning with the decision of Lord Eldon in *Gee v. Pritchard*, 2 Swanston, 428. The rule as laid down by McCoun, Vice Chancellor, in *Wetmore v. Scovell*, 3 Edw. Ch., 515, may, therefore, be considered as well established, that "independent of property, and disconnected therefrom, there is no ground or principle on which the jurisdiction to restrain the publication of private letters can properly rest."

<sup>2</sup> 2 Story's Eq., § 949.

<sup>3</sup> *Granard v. Dunkin*, 1 Ball & B., 207; *Thompson v. Stanhope*, Amb., 737. But see *Wren v. Cosmopolitan Gas Co.*, 2 Hun, 666, where an injunction was refused which was

obtained from an agent, if not published for profit, but in vindication of defendant's character, which has been aspersed by complainant, will not be restrained.<sup>1</sup>

§ 1013. It would seem that scientific lectures, delivered orally, may not be published for profit, or sold for publication, by those entitled to hear them.<sup>2</sup> And students, who have been permitted to copy the system of their instructor in a particular art, will be restrained from its publication, as a fraud upon his rights of property, since an author's use of his manuscripts in the way of instruction is not an abandonment of them to the public.<sup>3</sup> So where one prepares a scientific lecture, which he retains in manuscript and delivers to an audience admitted by ticket, while the persons so admitted are at liberty to take notes of the lecture for their own information, they may be enjoined from publishing such notes, even though they are published in short hand.<sup>4</sup>

§ 1014. While the publication of an original work of the same nature, and under a similar title to that of complainant, will not be enjoined, an injunction may properly be allowed to restrain defendant from publishing a magazine as a continuation in successive numbers of complainant's magazine, and also to prevent the publication by defendant of communications received by him while publishing for complainant.<sup>5</sup>

§ 1015. Upon the question of preventive relief in equity against the publication of libelous statements, affecting the character or business of plaintiff, the authorities, both English and American, indicate a noticeable want of uniform-

sought to restrain defendant from circulating letters conveying notice that it would not permit an infringement of its patent: See *S. C.*, 5 *Thomp. & C.*, 686.

<sup>1</sup>*Perceval v. Phipps*, 2 *Ves. & B.*, 19.

<sup>2</sup>*Abernethy v. Hutchinson*, 3 *L. J. R. Ch.*, 209.

<sup>3</sup>*Bartlette v. Crittenden*, 4 *McLean*, 300.

<sup>4</sup>*Nicols v. Pitman*, 26 *Ch. D.*, 37.

<sup>5</sup>*Hogg v. Kirby*, 8 *Ves.*, 215.

See as to the right to enjoin the publication of matter contained in plaintiff's newspaper under the English Copyright Act of 1842, *Cate v. Devon & E. C. N. Co.*, 40 *Ch. D.*, 500.

ity, and are, indeed, wholly irreconcilable. The earlier English doctrine, and that which seems most in accord with the principles governing the jurisdiction of equity by way of injunction, was that the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity would not restrain the publication of libels or works of a libelous nature, even though such publications were calculated to injure the credit, business, or character of the person aggrieved, and that he would be left to pursue his remedy at law.<sup>1</sup> Thus, the court has refused to enjoin defendants from publishing or circulating statements to deter persons from becoming shareholders in plaintiffs' company, and asserting that plaintiffs were infringing defendants' rights under letters patent; and whether such statements were well or ill founded was held not material to be considered upon an application for an injunction.<sup>2</sup> And it has been held that the owner of a patent, whose validity is not impeached, can not be enjoined from issuing notices warning persons from purchasing certain articles upon the ground that they are an infringement of his patent, when it does not appear that such statements are untrue or made *mala fide*.<sup>3</sup> Upon the other hand, injunctions have been freely granted in England to prevent the publication of advertisements or circulars containing false statements which were calculated to injure plaintiffs in their property or business, such as statements by a patentee of his intention to institute legal proceedings for the infringement of his patent

<sup>1</sup> Prudential Assurance Co. v. Knott, L. R. 10 Ch., 142; S. C., 7 Chicago Legal News, 405, overruling Springhead Spinning Co. v. Riley, L. R. 6 Eq., 551, and, Dixon v. Holden, L. R. 7 Eq., 488; Clark v. Freeman, 11 Beav., 112; Mulhern v. Ward, L. R. 13 Eq., 619; S. C.; 4 Chicago Legal News, 440; Hammersmith Co. v. Dublin Co., I. R. 10 Eq., 235.

<sup>2</sup> Hammersmith Co. v. Dublin Co., I. R. 10 Eq., 235. See Thorley's Cattle Food Co. v. Massam, 6 Ch. D., 582.

<sup>3</sup> Halsey v. Brotherhood, 19 Ch. D., 386. See also Quartz Hill C. G. Co. v. Beall, 20 Ch. D., 501; Hill v. Hart Davies, 21 Ch. D., 798; Liverpool Association v. Smith, 37 Ch. D., 170.

by another manufacturer, when defendant had no *bona fide* intention of so doing.<sup>1</sup> So a discharged employee has been enjoined from making false and slanderous statements to the customers of his former employers concerning their business and financial standing, which were calculated to do them serious injury.<sup>2</sup> So pending the trial of an action between the parties, defendant has been enjoined from the threatened publication of circulars abusive of plaintiff and calculated to prejudice him in the trial of his cause.<sup>3</sup> The question, as regards the publication by patentees of statements threatening suits or legal proceedings against alleged infringers, has been finally set at rest in England by an act of parliament authorizing injunctions in such cases, unless the patentee shall with due diligence institute and prosecute the threatened actions for infringement.<sup>4</sup> The American authorities display the same want of harmony upon the question under consideration which has characterized the English decisions. The weight of American authority, however, seems clearly to support the doctrine of the earlier English cases denying relief in equity against the publication of libelous or slanderous statements, or threats by a patentee of suits for infringement, although there are not wanting decisions of respectable courts to the contrary.<sup>5</sup>

§ 1016. The question whether a translation of a copyrighted work is or is not such an infringement as to entitle the author to the protection of equity, has seldom been

<sup>1</sup> Rollins v. Hinks, L. R. 13 Eq., 355; Axmann v. Lund, L. R. 18 Eq., 330; Thorley's Cattle Food Co. v. Massam, 14 Ch. D., 763; Thomas v. Williams, 14 Ch. D., 864; Hayward v. Hayward, 34 Ch. D., 198.

<sup>2</sup> Loog v. Bean, 26 Ch. D., 306.

<sup>3</sup> Kilcat v. Sharp, 52 L. J. R. N. S. Ch., 134.

<sup>4</sup> 46 & 47 Vict., August 25, 1883, Ch. 57, § 32. For cases construing this statute, see Driffield v. Waterloo Co., 31 Ch. D., 638; Kurtz v.

Spence, 33 Ch. D., 579; Challender v. Royle, 36 Ch. D., 425.

<sup>5</sup> Brandreth v. Lance, 8 Paige, 23; Life Association v. Boogher, 3 Mo. App., 173; Kidd v. Horry, 28 Fed. Rep., 773; Baltimore Car Wheel Co. v. Bemis, 29 Fed. Rep., 95. See, *contra*, Emack v. Kane, 34 Fed. Rep., 46; Bell v. Singer Co., 65 Ga., 452. See also Meyer v. Devries, 64 Md., 532; Chase v. Tuttle, 27 Fed. Rep., 110.

presented as a direct question for the decision of the courts, although numerous *dicta* may be found in the adjudicated cases bearing more or less directly upon the subject.<sup>1</sup> It has, however, been held in one instance that a translation is not such an infringement as to call for the aid of equity, and that it will not be enjoined. The court proceeded upon the reasoning that an author can claim no literary property, after publication, in his ideas, thoughts or sentiments, apart from the language and outward semblance in which they are couched; and that when he has sold his book, the only property which he can reserve to himself, or in which the law will protect him, is the exclusive right to multiply copies of the particular combination of characters in which his ideas are clothed.<sup>2</sup> While the doctrine thus stated has

<sup>1</sup> See *Millar v. Taylor*, 4 Burr., 2303; *Murray v. Bogue*, 1 Drew., 353; *Prince Albert v. Strange*, 2 DeGex & S., 652; *Burnett v. Chetwood*, 2 Meriv., 441, note.

<sup>2</sup> *Stowe v. Thomas*, 2 Wal. Jr., 547; S. C., 2 Am. Law Reg., 210. This was a bill for an injunction, alleging that complainant was the author and proprietor of a work called "Uncle Tom's Cabin," which was duly copyrighted, and that defendant had translated the same into German, and printed, published and sold it, both in newspaper and pamphlet form. The answer admitted the facts, but denied that they constituted an infringement. The relief was denied, Grier, J., observing as follows: \* \* \* "An author may be said to be the creator, or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book and given his

thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who can not be deprived of the use of them, or their right to communicate them to others clothed in their own language, by lecture or by treatise. The claim of literary property, therefore, after publication, can not be in the ideas, sentiments or the creations of the imagination of the poet or novelist, as dis severed from the language, idiom, style or the outward semblance and exhibition of them. His exclusive property in the creation of his mind can not be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself,

not been overruled by any judicial decision, yet it is so manifestly opposed to the evident purpose of all our copy-

or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright. See Curtis on Copyright, 9, 10, 11, etc. \* \* \* The notion that a translation is a piracy of the original composition, is founded on the analogy assumed between copyright and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodies the principle or essence of the invention. But as the author's exclusive property in a literary composition, or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence, in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work requiring invention, learning and judgment, or only a mere transcript of the whole or parts of the original, with merely colorable variations. Hence, also, the many cases to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright. To make

a good translation of a work often requires more learning, talent and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call a translation of an author's ideas and conceptions into another language a copy of his book would be an abuse of terms, and arbitrary judicial legislation. \* \* \* The distinction taken by some writers on the subject of literary property, between the works which are *publici juris*, and those which are subject to copyright, has no foundation in fact, if the established doctrine of the cases be true, and the author's property in a published book consists only in a right of copy. By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris*, as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. They are no longer her own—those who have purchased her book may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, the exclusive right to print, re-print and vend it; and those only can be called infringers of her right, or pirates of her property, who are

right legislation, and so opposed to the plainest principles of justice, that it is believed that a contrary doctrine will be applied should the question ever again be presented to the courts.<sup>1</sup> And where one has published and copyrighted a work containing translations from foreign works, which were translated by a person employed and paid by plaintiff, he is entitled to enjoin the publication of such translations.<sup>2</sup>

§ 1017. The question of piracy is to be considered as confined to the multiplication of copies of the original work; any use of the original, other than multiplying it, whether by public readings or recitations, or even by the representation of a play founded upon or derived from the work, does not constitute such an infringement as equity will restrain, subject, however, to the limitation that no copies are to be distributed among the audience.<sup>3</sup> But the printing and publishing of a play which is taken largely from plaintiff's books may be perpetually enjoined, regardless of the question of pecuniary damage.<sup>4</sup> And it has been held that the multiplication of copies, in the absence of any intention to sell them, is an infringement.<sup>5</sup>

§ 1018. It would seem that under the English statutes, although a newspaper is not copyrightable, it is yet entitled to protection as an article of property, and a bill may be entertained to restrain the publication by defendant of matter taken from plaintiff's newspaper.<sup>6</sup> But it has been held in England that there is no copyright in a descriptive ad-

guilty of printing, publishing, importing or vending without her license 'copies' of her book.' In topical, but not very precise phraseology, a translation may be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book. The plaintiff's bill is therefore dismissed with costs."

<sup>1</sup> See the vigorous criticism of Mr. Drone upon the case of *Stowe v. Thomas*, Drone on Copyright, 454 *et seq.*

<sup>2</sup> *Wyatt v. Barnard*, 3 Ves. & B., 77.

<sup>3</sup> *Reade v. Conquest*, 9 C. B. N. S., 755; *Tinsley v. Lacy*, 1 Hem. & M., 747.

<sup>4</sup> *Tinsley v. Lacy*, 1 Hem. & M., 747.

<sup>5</sup> *Novello v. Sudlow*, 12 C. B., 177.

<sup>6</sup> *Cox v. Land & Water Journal Co.*, L. R. 9 Eq., 324. But the injunction was refused upon the facts of the case. And see *Walter v. Howe*, 17 Ch. D., 708; *Cate v. Devon & E. C. N. Co.*, 40 Ch. D., 500.



vertisement or illustrated guide used for advertising goods which are manufactured and sold by plaintiff, and that equity will not enjoin the piracy of such a publication.<sup>1</sup>

§ 1019. An injunction may properly be allowed to restrain the publication by defendant of a work which he represents to be that of plaintiff, when it is in fact not the plaintiff's production.<sup>2</sup> And where defendant publishes a literary work which he represents to be the production of plaintiff, when only a portion of it is such, an injunction is the appropriate remedy if the public are likely to be misled by the title page of defendant's work into the belief that it is plaintiff's.<sup>3</sup> Where, however, defendant's statements do not amount to a representation that his publication contains matter which is the exclusive property of plaintiff, the injunction will not be allowed, even though defendant has used language concerning plaintiff's edition which, if untrue, might be actionable.<sup>4</sup>

§ 1020. There may be copyright in part of a book, although not in the whole, and such part will be protected in equity by enjoining a piracy.<sup>5</sup> And when the infringement goes to a part of plaintiff's work, and there is no difficulty in distinguishing such part from the residue, the injunction will go as to that part, but not as to the remainder.<sup>6</sup> So it is proper to enjoin as to the parts which are pirated, without waiting until the pirated matter has been definitely ascertained.<sup>7</sup>

§ 1021. In actions to restrain the infringement of copyrights the right to an account of profits is an incident to the right to relief by injunction; and such an account may be had under the prayer for general relief, although not specially prayed.<sup>8</sup>

<sup>1</sup> *Cobbett v. Woodward*, L. R. 14 Eq., 407. But see this case criticised, *Drone on Copyright*, 165 *et seq.*

<sup>2</sup> *Lord Byron v. Johnston*, 2 Meriv., 29.

<sup>3</sup> *Harte v. De Witt*, 1 Cent. L. J., 360.

<sup>4</sup> *Seeley v. Fisher*, 11 Sim., 581.

<sup>5</sup> *Low v. Ward*, L. R. 6 Eq., 415.

<sup>6</sup> *Carnan v. Bowles*, 2 Bro. C. C., 81; S. C., 1 Cox, 283; *Farmer v. Elstner*, 33 Fed. Rep., 494.

<sup>7</sup> *Kelly v. Morris*, L. R. 1 Eq., 697.

<sup>8</sup> *Stevens v. Gladding*, 17 How., 447.

## II. PRINCIPLES GOVERNING THE JURISDICTION.

- § 1022. The general doctrine stated.
1023. Establishing title at law.
1024. How piracy determined; defendant's intent immaterial.
1025. The doctrine applied; deception of purchasers; copying errors of plaintiff's book.
1026. Doctrine of relative convenience; injunction refused when infringement doubtful.
1027. Piracy not protected; immoral and irreligious works.
1028. Doctrine of acquiescence and laches.
1029. Illustrations of the doctrine.
1030. Foundation of the doctrine; burden of proof.
1031. No acquiescence without knowledge.
1032. Usage as to reviewing magazines can not prevent relief against piracy.
1033. When relief withheld until action at law; difficulty in estimating profits.
1034. Effect on sale of defendant's work no bar to relief.
1035. Restrictive covenant by author or proprietor on sale of work.
1036. How pirated parts to be designated.
1037. Injunction conditioned upon action at law.

§ 1022. The true principle to be applied in cases where it is sought to restrain a piracy of copyright is, that defendant is not at liberty to use or avail himself of plaintiff's labor for the purpose of producing his work.<sup>1</sup> If the infringement is palpable and a provisional injunction will not be attended with serious injury, it is not ordinarily refused as to so much of defendant's work as is a plain infringement of plaintiff's publication.<sup>2</sup> Where the bill upon its face establishes the existence of the copyright and of complainant's title, and shows a wrongful and wilful violation thereof, from which serious injuries have resulted, or are likely to result, the injunction will be granted, its extent depending upon the proof and the nature of the publication.<sup>3</sup> And this relief is not dependent upon the discov-

<sup>1</sup> *Hogg v. Scott*, L. R. 18 Eq., 444.

<sup>3</sup> *Atwill v. Ferrett*, 2 Blatch., 39; *Lewis v. Fullarton*, 2 Beav., 6.

<sup>2</sup> *Banks v. McDivitt*, 13 Blatch., 163.

ery prayed by the bill, but rests upon the equities stated, and may be granted or refused independent of the discovery.<sup>1</sup>

§ 1023. We have already seen, in discussing the subject of injunctions to restrain the infringement of patents, that the stringency of the rule formerly maintained by the English Court of Chancery, requiring the right to be first established at law, has been much relaxed, and that where the right is clear and the infringement unquestioned, the patentee will not be compelled in the first instance to proceed at law.<sup>2</sup> The same observations are applicable where an injunction is sought against an infringement of copyright, and while the court may, if it sees fit, require a verdict at law touching the alleged infringement,<sup>3</sup> yet the doctrine may now be regarded as well settled, that both the right and the infringement may be adjudicated in a court of equity, without having been first determined at law.<sup>4</sup> And where the same judge sits both in law and in equity, there is not the same necessity for requiring plaintiff to first establish his title at law as formerly existed under the English practice, where the chancellors and common law judges were different; and if all the necessary facts are before the court, it may determine the application for an injunction without sending plaintiff to law to establish his title.<sup>5</sup> Equity will not, however, grant an injunction to restrain the infringement of a copyright unless plaintiff's title is clear.<sup>6</sup> But it is not indispensable to obtaining the relief that plaintiff should make out a clear legal title, and the court will be content with a *prima facie*

<sup>1</sup> Atwill v. Ferrett, 2 Blatch., 39.

<sup>2</sup> See § 936, *ante*, and cases cited.

<sup>3</sup> Blunt v. Patten, 2 Paine, 397.

<sup>4</sup> Farmer v. Calvert L. E. & M. P. Co., 5 Chicago Legal News, 1.

<sup>5</sup> Pierpont v. Fowle, 2 Woodb. & M., 23. And see this case as to the right to protect the copyright in

the extended term, as between an author and one by whom he is employed and paid to write the work, and to whom he sells the copy-right.

<sup>6</sup> Lowndes v. Duncombe, 2 Coop. t. Cottenham, 216.

title, either legal or equitable, or with a clear color of title and assertion of the right.<sup>1</sup>

§ 1024. The chief difficulty experienced in attempting to apply the principles of equity to the protection of copyrights is in ascertaining whether the work sought to be enjoined is an original or a piracy. If the work is of such a character that the piracy may be easily detected, the court will itself make the examination.<sup>2</sup> But the more usual practice is to refer the case to a master, who examines the works and reports to the court; and upon this report the interlocutory as well as the final decree is generally based.<sup>3</sup> And if it is ascertained that the publication complained of is piratical, the question of guilt or innocence on the part of defendant is immaterial, and the relief will be granted, regardless of the intent with which defendant's work was published.<sup>4</sup> The question of intent only becomes material in cases of doubt as to the invasion of the right.<sup>5</sup> So if defendants are guilty of a clear infringement of plaintiff's copyright, the fact that they have circulated their publication only among their own agents or customers and have not publicly sold or offered it for sale constitutes no bar to an injunction.<sup>6</sup> Nor is it necessary to show that defendant's publication is a substitute for the original work, or to prove any actual damage sustained by the infringement to entitle plaintiff to relief by injunction.<sup>7</sup>

<sup>1</sup> 2 Story's Eq., § 935; *Universities v. Richardson*, 6 Ves., 689; *Chappell v. Purday*, 4 Y. & C., 485. As to the right to relief by injunction for the protection of a foreigner under the English copyright law, see *Delondre v. Shaw*, 2 Sim., 237.

<sup>2</sup> *Lewis v. Fullarton*, 2 Beav., 6.

<sup>3</sup> 2 Story's Eq., § 941; *Cary v. Faden*, 5 Ves., 24. But in *Smith v. Johnson*, 4 Blatch., 252, it is held that the motion for the injunction must be disposed of on

the moving papers of complainant and defendant's affidavits in opposition thereto, and that on such motion no reference to a master will be allowed.

<sup>4</sup> *Reade v. Conquest*, 11 C. B. N. S., 479; *Reed v. Holliday*, 19 Fed. Rep., 325.

<sup>5</sup> *Webb v. Powers*, 2 Woodb. & M., 497.

<sup>6</sup> *Ager v. Peninsular & O. S. N. Co.*, 26 Ch. D., 637.

<sup>7</sup> *Reed v. Holliday*, 19 Fed. Rep., 325.

§ 1025. If the fact of piracy be clearly established the *animus furandi* is to be inferred from the act of piracy itself. And where some of plaintiff's poems are published by defendant entire in his work, and large extracts are given from others, the pirated matter constituting the chief value of defendant's book, an injunction should be allowed. If, in such case, plaintiff's right has been clearly violated, he is the best judge as to whether he has actually been injured, and the court will incline to grant the injunction upon satisfactory proof of the piracy.<sup>1</sup> So when defendant produces a book with such similarity of title, form and title-page to that of plaintiff as to induce purchasers to believe that they are buying plaintiff's work, a proper case is presented for an injunction.<sup>2</sup> And the fact of defendant having copied the errors of plaintiff's book is an ordinary and familiar test in determining whether he is guilty of such a piracy as to warrant an injunction.<sup>3</sup>

§ 1026. The doctrine of relative convenience is applicable to cases where it is sought to enjoin the piracy of copyright, as well as to most other branches of the law of injunctions. And upon an application for an interlocutory injunction in this class of cases, the court may consider the question as to which of the parties is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature. And if, upon such consideration, the court is satisfied that the ends of justice will be better attained by refusing than by granting the injunction, it may withhold the relief; but it may, in such event, require defendants to continue to keep an account, giving an undertaking with respect to damages in the event of plaintiff's title and the infringement thereof being ultimately established.<sup>4</sup> So if upon the motion for a preliminary injunction there are

<sup>1</sup> Campbell v. Scott, 11 Sim., 30.

<sup>2</sup> Metzler v. Wood, 8 Ch. D., 606.

<sup>3</sup> Murray v. Bogue, 1 Drew., 353.

And see this case as to the considerations governing the court in re-

fusing an interlocutory injunction against an alleged infringement of plaintiff's guide-book.

<sup>4</sup> McNeill v. Williams, 11 Jur., 344.

grave doubts whether plaintiff actually has a copyright in the publication in question, or, if he has a copyright, whether defendant has infringed, the court will not pass upon these questions upon a preliminary application, and will refuse the injunction *in limine*, leaving the whole matter to be determined upon the final hearing.<sup>1</sup>

§ 1027. The interference by injunction being purely equitable, he who seeks this species of relief must come into court with clean hands, and a book which is itself a piracy will not be protected.<sup>2</sup> And since, on grounds of public policy, no copyright can exist in a work which is manifestly immoral, irreligious or obscene, if it be matter of doubt whether the work in favor of which the aid of equity is sought comes within these classes, the threatened piracy will not be restrained, but the party will be left to pursue his remedy at law.<sup>3</sup> And where there was doubt as to whether the work sought to be protected impugned the doctrine of the Scriptures; an injunction was refused against its infringement.<sup>4</sup>

§ 1028. Upon the question of the effect of plaintiff's acquiescence in defendant's publication, and of his laches and delay in invoking equitable relief, the same general principle is applicable which governs in other branches of the law of injunctions: That principle is, that a plaintiff who, with full knowledge of all the facts, acquiesces in a given course of conduct on the part of defendant, and knowingly per-

<sup>1</sup> *Miller v. McElroy*, 1 Am. Law Reg., 198.

<sup>2</sup> *Cary v. Faden*, 5 Ves., 24.

<sup>3</sup> 2 Story's Eq., § 936; *Walcot v. Walker*, 7 Ves., 1; *Southey v. Sherwood*, 2 Meriv., 435; *Lawrence v. Smith, Jac.*, 471. And see *Martineti v. Maguire*, 1 Abb. U. S. R., 356.

<sup>4</sup> *Lawrence v. Smith, Jac.*, 471. Eldon, Chancellor, says: "Looking at the general tenor of the work, and at many particular parts of it,

recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I can not continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again."

mits the expenditure by defendant of large sums of money upon the strength of such acquiescence, or who is guilty of great laches and long delay in the assertion of his rights, may be estopped from afterward enjoining defendant from asserting the right in controversy. And the rule may be regarded as well established that whenever defendant has been induced by plaintiff's conduct or encouragement to go on with the publication in question, or when plaintiff has for a long period knowingly acquiesced in such publication without remonstrance or complaint, a court of equity may properly refuse to lend its aid by injunction to restrain the alleged infringement of plaintiff's copyright.<sup>1</sup>

§ 1029. As illustrating the doctrine of acquiescence as applied to actions to restrain the infringement of copyright, it is held that where the alleged piracy consists in the publication of a spelling-book containing alterations and improvements from former works of the same nature, and defendant has been allowed to publish for two years, without objection, an injunction will be refused and complainant will be left to his remedy at law.<sup>2</sup> And where the matter alleged to be pirated forms a very inconsiderable portion of the work, consisting merely of arithmetical calculations which may be again computed by a few hours labor, and thus give defendant an unquestioned right to their publication, complainant having for a number of years slept upon his rights without objecting, an injunction will be refused.<sup>3</sup> So an injunction has been refused which was sought for the protection of a work giving interest tables with calculations of interest on money for different periods.<sup>4</sup> And

<sup>1</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711; *Bailey v. Taylor*, 3 L. J., 66; *Rundell v. Murray*, Jac., 311; *Southey v. Sherwood*, 2 Meriv., 435; *Lewis v. Chapman*, 3 Beav., 133; *Tinsley v. Lacey*, 1 Hem. & M., 747; *Assignees v. Wilkins*, 8 Ves., note to page 224, second English edition. See also *Chappell v. Sheard*, 1 Jur. N. S., 996; *Corre-*

*spondent Newspaper Co. v. Saunders*, 12 L. T. N. S., 540. But see *Drone on Copyright*, 508.

<sup>2</sup> *Assignees v. Wilkins*, 8 Ves., note to page 224, second English edition.

<sup>3</sup> *Baily v. Taylor*, 1 Russ. & M., 73; S. C., Taml., 295.

<sup>4</sup> *King v. Reed*, 8 Ves., note to page 223, second English edition.

generally it may be said that a court of equity in the exercise of its discretion as to interfering by injunction before the legal right is established, will not enjoin an alleged infringement of a copyright, before action at law, where complainant's conduct has been such as to induce defendants to believe that their publication would not be interfered with.<sup>1</sup> Thus; where the owner of a copyright has, for a considerable period of time, permitted persons to copy cases from his works without objection, he will not be allowed to enjoin other parties from transcribing cases from the same works, until he has first established his title at law.<sup>2</sup> And where plaintiff gives a publication to defendant without compensation, and permits him to publish it for a period of fourteen years without objection or complaint, equity will refuse to enjoin defendant from such publication.<sup>3</sup> So where it is sought to enjoin the publication of a work which the author had for many years left in the hands of a book-seller to whom it was originally sent for publication, the author having subsequently abandoned his intention of publishing it, and the book having passed into the hands of defendants who published it with the author's consent, an injunction was refused until plaintiff should establish his right at law.<sup>4</sup> And where the two works were preparing for publication at the same time, and defendant's was completed more than six years before the filing of the bill, and for more than a year before instituting their action plaintiffs were in possession of a complete copy of defendant's work, which they had obtained for purposes of comparison, an injunction was refused.<sup>5</sup>

§ 1030. The doctrine of laches as a bar to equitable relief in cases of this nature also rests upon the principle that if the owner of the copyright or musical composition for

<sup>1</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711. And see *Bramwell v. Halcomb*, *ib.*, 737.

<sup>2</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711.

<sup>3</sup> *Rundell v. Murray*, Jac., 311.

<sup>4</sup> *Southey v. Sherwood*, 2 Meriv., 435.

<sup>5</sup> *Lewis v. Chapman*, 3 Beav., 133.



which protection is sought suffers one infringement upon his rights to go unchallenged, the court will be averse to permitting him to question another infringement. Plaintiff must, therefore, purge himself of laches before he can be allowed relief; although the burden of proving it in the first instance rests upon the defendant, who must show a clear knowledge by plaintiff of the former infringements and his acquiescence therein for a long period of time, if he seeks to fasten upon plaintiff the consequences of such laches for the purpose of preventing him from obtaining relief against other infringements.<sup>1</sup>

§ 1031. It is, however, to be borne in mind that there can be no such acquiescence in defendant's publication, within the meaning of the rule, as to bar relief in equity, unless plaintiff has had full knowledge of the publication which he afterward seeks to enjoin. And the fact that plaintiff's book has been out of print for a number of years, and has become obsolete and forgotten in the trade, will not prevent relief by injunction against an infringement of his rights.<sup>2</sup> So it has been held that knowledge on the part of plaintiff that defendant was advertising his book which contained the objectionable matter in controversy, and that he was going on with its sale, or that he was about to issue a new edition, did not constitute such acquiescence as to prevent relief in equity by injunction.<sup>3</sup>

§ 1032. The mere custom or usage of the trade to publish extracts or stories from a copyrighted periodical can not be successfully interposed as a bar to relief by injunction against the infringement. Thus, where plaintiff was the publisher of a magazine in London, which he had been in the habit for many years of sending to defendant for review in a country newspaper published by the latter, and defendant had been in the habit of reviewing such magazine and from time to time publishing extracts or an entire story therefrom, giving credit for the same and sending plaintiff

<sup>1</sup> *Chappell v. Sheard*, 1 Jur. N. S., 996.

<sup>2</sup> *Weldon v. Dicks*, 10 Ch. D., 247.

<sup>3</sup> *Hogg v. Scott*, L. R. 18 Eq., 444.

copies of such papers, and defendant received another copy of the magazine which he reviewed and from which he published two articles entire, acknowledging the same and sending copies to the plaintiff, the court granted an injunction to restrain such piracy, notwithstanding the custom or usage, but because of defendant's good faith required each party to pay his own costs.<sup>1</sup>

§ 1033. Where an injunction against the invasion of a copyright depends upon the effect of an agreement and the construction it shall receive, relief may be withheld until a recovery in an action at law. And if the publication is of such a nature as to render it doubtful whether the author can maintain any action at law, an injunction will be withheld until the court can be satisfied upon this point.<sup>2</sup> But mere difficulty in estimating the profits arising from a sale of books sought to be enjoined will not deter a court of equity from awarding an injunction.<sup>3</sup>

§ 1034. The fact that an injunction will effectually stop the sale and circulation of the work enjoined constitutes no objection to granting the relief if the piracy be established, since, if the original can not be separated from the pirated matter without destroying the value of the former, the defendant, having made the mixture, must suffer the consequences.<sup>4</sup> And the same principles apply in such case as

<sup>1</sup> *Maxwell v. Somerton*, 30 L. T. N. S., 11.

<sup>2</sup> *Walcot v. Walker*, 7 Ves., 1. Lord Eldon says: "If the doctrine of Lord Chief Justice Eyre is right, and I think it is, that publications may be of such a nature that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but

which the policy of the law will not permit him to consider his property. It is no answer that the defendants are as criminal. It is the duty of the court to know whether an action at law would lie; for, if not, the court ought not to give an account of the unhallowed profits of libelous publications."

<sup>3</sup> *Universities v. Richardson*, 6 Ves., 689.

<sup>4</sup> 2 Story's Eq., § 942; *Mawman v. Tegg*, 2 Russ., 385. And see *Jarrold v. Houlston*, 3 Kay & J., 708.

are applicable to the malicious or wanton confusion of property.<sup>1</sup>

§ 1035. Where an author has sold and assigned the copyright of his work, published in his name, and has bound himself by express covenant not to publish any work prejudicial to the sale of the former, a publisher who, with notice of such covenant, publishes a work purchased from the same author, in the same name and upon the same subject, will be enjoined, although the latter work is not a piracy of the former, and is published under a different title.<sup>2</sup> But the rule would seem to be otherwise where the publisher purchases the rival work in good faith, and without notice of the covenant on the part of the author.<sup>3</sup> And where the proprietor of a weekly periodical assigns his copyright and entire interest, for a valuable consideration, and at the same time agrees not to publish any weekly periodical of like nature, he may be enjoined from publishing a daily journal under the same name and at the same price, complainant undertaking to abide by the order of the court as to damages, and to bring his action at law against defendant within one week.<sup>4</sup>

§ 1036. It is not incumbent upon plaintiff to specify in his bill or by affidavit the particular parts of his work alleged to be pirated, and a general allegation that defendant's publication contains passages from his own, accompanied with a verification of the rival works by affidavit, will suffice.<sup>5</sup> Where, however, there is nothing before the court to identify or distinguish those parts of plaintiff's work in which he claims a copyright, and defendant's affidavits deny the equities of the bill, an injunction will not be granted *in limine*.<sup>6</sup>

§ 1037. It is proper for the court to grant the injunction

<sup>1</sup> Mawman v. Tegg, 2 Russ., 385.

<sup>4</sup> Ingram v. Stiff, 5 Jur. N. S.,

<sup>2</sup> Barfield v. Nicholson, 2 L. J. 947.

Ch., 90; S. C., 2 Sim. & St., 1.

<sup>5</sup> Sweet v. Maugham, 11 Sim., 51.

<sup>3</sup> Barfield v. Nicholson, 2 L. J.

Ch., 90; S. C., 2 Sim. & St., 1.

<sup>6</sup> Flint v. Jones, 1 Weekly Notes of Cases, 334.

upon condition of plaintiff bringing an action at law to establish his legal title.<sup>1</sup> But when the injunction is continued subject to plaintiff bringing his action at law, defendant will not be allowed, without plaintiff's consent, to continue the sale of the work upon condition of keeping an account.<sup>2</sup>

<sup>1</sup> *Campbell v. Scott*, 11 Sim., 30.

<sup>2</sup> *Sweet v. Maugham*, 11 Sim., 51.

## III. DRAMATIC COMPOSITIONS.

- § 1038. Distinction between statutory and common law right; jurisdiction of state and federal courts.
1039. Representation of plaintiff's play not such publication as to debar him from relief.
1040. Different doctrine in England.
1041. Unauthorized production of play enjoined.
1042. Adaptation protected.
1043. Memorization of play; conflict of authority.
1044. Strict compliance necessary with conditions precedent to statutory copyright.
1045. Title of play not protected.
1046. Dramatization of novel; colorable imitation; parties *in pari delicto*.
1047. Scenic or spectacular effects.
1048. Immoral play not protected.
1049. Unpublished manuscripts protected by act of Congress.
1050. Translation protected.
1051. Injunction against publication of manuscript.
1052. Deposit of money in lieu of injunction.

§ 1038. The protection of dramatic compositions from piracy or infringement, either by publication or by their unauthorized representation upon the stage, affords frequent occasion for invoking the preventive aid of equity by injunction. In the case of a published play, where due compliance has been had with the formalities of the copyright law, protection must be sought under that law, as in other cases of copyright; in which event, of course, the remedy is to be sought in the federal courts.<sup>1</sup> But the author or owner of an unpublished drama which remains in manuscript has such a property in its use and enjoyment as will be protected by injunction, such property not being distinguishable from other personal property, being governed by the same rules of transfer and entitled to the benefit and protection of the same remedies.<sup>2</sup> And the alienage of the

<sup>1</sup> See as to the jurisdiction of the United States courts in such cases, Drone on Copyright, chapter xii. 532, affirming S. C., 2 Sweeny, 530, 3 Albany Law Journal, 54; Crowe v. Aiken, 2 Biss., 208; French v.

<sup>2</sup> Palmer v. De Witt, 47 N. Y., Maguire, 55 How. Pr., 471; Bouci-

author affords no obstacle to him or his assignee in proceeding to enjoin a violation of his rights of property in such unpublished manuscript, and the state courts have undoubted jurisdiction to afford relief in such cases, as in other actions affecting common law rights or property interests.<sup>1</sup> So a court of general equity powers in one state, which has acquired full jurisdiction over the parties to the controversy, may properly enjoin a defendant from infringing plaintiff's proprietary right in an unpublished drama by its production in another state.<sup>2</sup> Or, if the proper conditions of citizenship exist to give the United States courts jurisdiction, the proceeding for the protection of the common law right by injunction may be brought in those courts.<sup>3</sup> This common law right, existing entirely independent of the copyright acts, may be transferred, and a court of equity will

*cault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150.

<sup>1</sup> *Palmer v. De Witt*, 47 N. Y., 532, affirming S. C., 2 Sweeny, 530, 3 Albany Law Journal, 54. The court say, p. 535: "Whatever rights the plaintiff has in the drama which is the subject of the controversy exist at common law, independent of any statute either of the state or of the United States. The protection he seeks is of property and a right of property which is well established and recognized wherever the common law prevails, and not of a franchise or privilege conferred by statute. The state courts have jurisdiction as in other actions affecting common law rights or property interests. \* \* Until published the work is the private property of the author, wherever the common law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to

such rights as the author may have secured under copyright laws, and they can have no force nor give any rights beyond the territorial limits of the government by which they are enacted. The rights of assignees domiciled here, of alien authors resident abroad, have been sustained by the courts of this country, and no distinction has been made between transfers of literary property and property of any other description. \* \* The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation or to prevent a violation of his rights of property in his unpublished works."

<sup>2</sup> *French v. Maguire*, 55 How. Pr., 471.

<sup>3</sup> *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Crowe v. Aiken*, 2 Biss., 208. See also *Goldmark v. Kreling*, 11 Sawy., 215; S. C., 25 Fed. Rep., 349.

protect the assignee of the right by granting him the aid of an injunction against its infringement.<sup>1</sup> And a purchaser of the original manuscript of a play or dramatic composition is entitled to protection by injunction against the infringement of his rights by defendant in producing his play, even though defendant has acted in good faith, and under the supposition that he himself owned the manuscript.<sup>2</sup>

§ 1039. Upon general principles, and irrespective of the operation of statutes, the doctrine is well established that the public representation of a play at a theater, or permitting it to be acted upon the stage, does not constitute such a publication as to deprive the author or owner of the play of his common law or proprietary right therein, or to debar him from relief by injunction against the infringement of that right.<sup>3</sup> And when plaintiff has the literary proprietorship of a manuscript play, but no statutory copyright, al-

<sup>1</sup> *Crowe v. Aiken*, 2 Biss., 208. "The author of any literary or dramatic work," says Drummond, J., p. 211, "is the sole proprietor of the manuscript and its contents, and of copies of the same, independently of legislation, so long as he does not publish it, or part with the right of property. This is called a common law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assignee, in a proper case, just as it will the owner of any other species of property. Those judges who maintained this common law right in the cases of *Millar v. Taylor* and in *Donaldson v. Becket*, decided a hundred years ago, it has always been thought, had the strength of the argument on their side in the great discussion to which they

gave rise. Subject to the qualification stated, it has been generally admitted in this country. \* \* I am of opinion that upon principle and authority the author, or his assignee, of an unpublished play, has a right of property in the manuscript and its incorporeal contents; that is, in the words, ideas, sentiments, characters, dialogue, descriptions, and their connection, independent of statutes, and that a court of equity can protect it."

<sup>2</sup> *Shook v. Daly*, 49 How. Pr., 366.

<sup>3</sup> *Macklin v. Richardson*, Amb., 694; *Keene v. Wheatley*, 9 Am. Law. Reg., 33; *Palmer v. Dewitt*, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, affirmed on appeal to the Court of Appeals, 47 N. Y., 532. See *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Roberts v. Meyers*, 23 Monthly Law Reg., 396.

though she has publicly performed it at her theater with the intention of continuing such performance, if defendants, against plaintiff's will, produce the play at another theater, having obtained it by taking advantage of a breach of confidence committed by a person in plaintiff's employ, a bill may be maintained for equitable relief.<sup>1</sup> And one who has possessed himself of the words and arrangement of a drama, from persons who have seen it publicly performed, will be restrained from its publication without the author's consent.<sup>2</sup>

<sup>1</sup> *Keene v. Wheatly*, 9 Am. Law Reg., 33. See *Keene v. Clark*, 5 Rob. (N. Y.), 38.

<sup>2</sup> *Palmer v. Dewitt*, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, decided in the Superior Court of New York City, General Term, affirmed on appeal to the Court of Appeals, 47 N. Y., 532. And see as to unauthorized representations of a play, *Morris v. Kelly* 1 Jac. & W., 481. In *Palmer v. Dewitt* complainant alleged that he had purchased the exclusive right of producing in the United States an unpublished comedy called "Play;" that the play had been produced by the author in England and by complainant in the United States, but with no intention of abandoning it, or of conferring upon any one the right of printing or publishing, and that defendant, in disregard of complainant's proprietary right, and without his knowledge or consent, had published and sold copies of the drama. The answer of defendant denied that the public representation of the play by the author did not confer upon or abandon to defendant the right of publishing, and alleged that the play had been many times performed in public in England, without any notice or prohibition to the

spectators against carrying it away, by memory or otherwise, and using or publishing it. Defendant further alleged that he received the words of the play and its arrangement, divisions and stage directions from persons who had obtained them by witnessing its performance on the stage as spectators. Monell, J., delivering the opinion of the Superior Court, General Term, says: \* \* \* "There can be no fixed rule determining when an author has surrendered his literary property. Printing his composition, and giving it public circulation, would fix the period of surrender in such a case; but one reading of a manuscript lecture, or one performance of a manuscript play, would not; and if one does not, what greater number, can it be said, will? The value, to the author, of a lecture or of a play, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first. So that it may fairly be assumed that it is not intended, in any case, to surrender property in a literary composition so long as the author



So the acting or representing a play at a theater is not such a publication as to preclude the author from taking out a

of it retains it in manuscript, and uses it before the public for his private pecuniary benefit. Therefore I think there can be no presumption against literary ownership arising from the mere frequency of performance. Such performances are not inconsistent with a continued proprietorship, but are wholly consistent with, and necessary to, the enjoyment of the property. \* \* \* Upon the subject of publication, I will here refer to some of the cases, either holding or sustaining that a representation of a play is not necessarily a publication of it, so as to deprive the author of his property in it. Judge Sprague so held in *Roberts v. Meyers*, 23 Monthly Law Reg., 396. He said it was not a publication within the meaning of the copyright law, and did not prevent an author from obtaining a copyright. It is affirmed by Judge Hoar, in *Keene v. Kimball*, 23 Monthly Law Reg., 669, where he says: 'The representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignees of their right of property.' In *Bartlette v. Crittenden*, 4 McLean, 300, 5 Ib., 32, it was held that the author of a lecture did not dedicate the manuscript to the public by using it for the purpose of instructing others. That case went further, and decided that an author did not abandon his right in his composition by permitting pupils or friends to take copies; and that such copies could not be used in any way not contemplated by the author. And in *Blunt v. Patten*, 2

Paine, 397, a deposit by the author of his work in a public office, such as a chart in the navy department, was held not to make it a public document, which any one might copy. And, again, in *Boucicault v. Wood*, 16 Am. Law Reg., 539. In a very recent case (*Crowe v. Aiken*, 2 Biss., 208), decided by Judge Drummond, in the circuit court of the United States for the district of Illinois, an injunction was asked for to restrain the representation by the defendant of the play called 'Mary Warner.' The play was written by Mr. Taylor for Miss Bateman, and the manuscript was transferred to the plaintiff. It was publicly represented in London and in the United States, but was not printed. The defendant alleged that the play was obtained from a person in London, who procured it from repeated representations on the stage at the Haymarket Theater, and that there was 'no restriction' against any of the spectators using such play as they saw fit. After a lengthened examination of the questions, the court decided to grant the injunction. In the opinion, the ground is distinctly taken that a representation is not a publication, and any manner of obtaining it, without the consent of the author or owner, 'except by memory,' is a violation of his proprietorship. As far, therefore, as this case depends upon an actual or constructive publication of the play by the plaintiff or his assignee, the clear weight of authority is, that public representation is not publi-

copyright and obtaining protection by injunction against its infringement.<sup>1</sup>

cation, and does not entitle any person, without the author's consent, to procure it in any way for purposes of publication, except, perhaps, when it is procured by means of the memory alone. I am aware that in the case of *Keene v. Wheatley*, 9 Am. Law Reg., 92, which is followed by *Keene v. Clarke*, 5 Rob. (N. Y.), 38, and again by *Crowe v. Aiken*, each of the learned judges leans to the opinion that an auditor may use his memory as a means of procuring a represented play, and may then lawfully print and publish it. The reason seems to be, that as there can be no power over or restriction of the use of the memory, therefore, such use is not unlawful. It is enough, however, perhaps, for the present case, to say that, even if it is true that an auditor at a public representation may lawfully carry away the play in his memory, and afterward put it in writing, and from such writing print and publish, there was no evidence in this case to bring it within that rule. The finding of the court is, that the defendant received the words of the comedy, etc., from one or more persons who had seen or heard it performed. That finding is not enough to justify the conclusion that the person or persons who saw or heard the public performance had brought it in their memories from the theater.

“The burden of proving the manner in which the play was procured was upon the defendant, and he

was bound to show that he had obtained it in a lawful way. There are no presumptions in his favor. The right of the plaintiff as owner, before publication, was absolute, and could be defeated only by showing that the defendant had obtained the play through the memory of an auditor. This is the result of the learned opinion of Judge Cadwallader in *Keene v. Wheatley*, *supra*, in which view he has fortified himself by the citation of many cases; and also of Judge Drummond, in *Crowe v. Aiken*, *supra*. But I am compelled to dissent from the opinions of the learned judges in those cases, so far as it is intimated that a spectator may, upon witnessing the public performance of a play, rightfully commit it to memory, and then publish it to the world; and also from a qualified view of the same character, entertained by the learned late chief justice of this court, as expressed in his opinion in *Keene v. Clarke*, *ubi supra*. It seems to me that any surreptitious procuring of the literary property of another, no matter how obtained, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play can not lawfully be taken down by a short-hand writer from the lips of the actors during a public per-

<sup>1</sup> *Roberts v. Meyers*, 23 Monthly Law Reg., 896.

§ 1040. In England, however, it is held that the author of a dramatic work which has been first represented upon

formance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterward writing it out? In principle it is not. They are only different modes of doing the same thing, and if without the author's consent are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterward as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common law right of property, as if his manuscript had been feloniously taken from his possession. I can see no difference. In the case of *Prince Albert v. Strange*, 2 DeG. and Sma., 652, a workman employed to take impressions from copper plates of etchings made by the plaintiff, not intended for publication, took impressions for himself and sold them to the defendant. It was held an infringement of the plaintiff's proprietary right, and an injunction was granted and the impressions ordered to be destroyed. The pleadings and proofs in this case were shaped so as to bring it within one of the propositions of the learned late chief justice in *Keene v. Clarke*, and it is accordingly found as a fact that the tickets admitting spectators to the performances contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using and printing the same, nor was

any notice to that effect posted in the theater in the view of the spectators. Whatever means a prudent man may adopt to prevent his property from being feloniously taken from him, it can not, I think, be successfully contended, that if he chooses to take the risk, he may not leave it exposed, without mark or other sign to designate it as his property; or that, by thus exposing it, he would lose his title, and could not afterward recover it, or its value, from one who tortiously took it. A wrongdoer can not get title to property, or escape the responsibility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen. If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of, or unauthorized by the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed, or are forbidden, to carry it away in that manner. Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges in *Keene v. Wheatley* and *Keene v. Clarke* and *Crowe v. Aiken* have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of

the stage in a foreign country is not entitled to an exclusive right of representation, nor to protection by injunction against an unauthorized production of his play, its representation upon the stage of a foreign country being a publication within the meaning of the statute,<sup>1</sup> which denies copyright to the author of a dramatic or musical composition which is first published out of Great Britain. And it is held, under such statute, that a dramatic composition is published, that is, made public, the moment it is represented or acted upon the stage.<sup>2</sup>

his literary property; and therefore any mode which effectuates that purpose is unlawful. The Vice Chancellor says, in *Prince Albert v. Strange*, *supra* (p. 689), that as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, a person who, without the owner's consent, express or implied, acquires a knowledge of, can not lawfully avail himself of the knowledge so acquired to publish, without his consent, a description of the property. That opinion goes quite as far as is necessary to destroy the distinction alluded to. There is another case to the same effect. In *Turner v. Robinson*, 10 Irish Ch., 121, a painting, on public exhibition for private emolument, was seen by spectators, some of whom from recollection, arranged themselves in tableau, representing the figures in the painting, and were photographed. The sale of engravings made from such photographs was restrained by injunction. The mode adopted for carrying into execution what was denounced by the court as an unlawful act was the same in the Irish case as was approved of in

the two cases alluded to, namely, in the memories of the spectators; and the case is therefore opposed, as an authority, to the distinction referred to. My conclusions upon the whole case are, that there was no such publication by the plaintiff, or by his assignor, of the play in question, as to deprive plaintiff of his common law right of property in it; that public representations of the play were not a publication of the play so as to take away such common law right; that there is no presumption in favor of the lawfulness of the manner in which the defendant obtained the play; that the burden is upon him to show that it came into his possession in a lawful manner; and that, having failed to show the lawfulness of his possession, he should be deprived of it. I am therefore of opinion, that the plaintiff is entitled to a judgment restraining the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print, and that, therefore, the judgment appealed from should be reversed."

<sup>1</sup> 7 Vict., ch. 12, sec. 19.

<sup>2</sup> *Boucicault v. Chatterton*, 5 Ch.

§ 1041. The unauthorized publication of a play from its representation at a theater, or its production at a theater other than that authorized by the owner of such play, constitutes a piracy for which redress may be sought in equity.<sup>1</sup> And the fact that plaintiffs have permitted other persons, under contract, to publish a novel founded upon the incidents of a drama which they seek to protect by injunction, is not such a dedication to the public or such an abandonment of their right of exclusive representation as to prevent the granting of an injunction for the protection of their rights. If, therefore, in such a case, the *prima facie* case made out by the bill and affidavits is not overcome by the answers or affidavits of defendants presented in opposition to the motion for an injunction, the relief will be allowed.<sup>2</sup>

§ 1042. A court of equity will lend its aid by injunction to protect a dramatic composition which is itself an adaptation from another, but with a new and different result attained by original and independent labor. For example, the owner of the manuscript of an original adaptation of a play, produced in a foreign country, and which is re-cast and changed by original labor to adapt it to the American stage, may be protected by injunction against its infringement. And it is not essential, in such case, that the manuscript shall be the exclusive work of one person; since the same reasons which warrant protection to the individual author will extend it to all whose joint action may contribute to the result finally attained.<sup>3</sup>

§ 1043. Upon the question whether an unlicensed performance of a manuscript play may be lawfully effected by preserving and reproducing it through the memory of spec-

D., 267; *Boucicault v. Delafield*, 1 Hem. & M., 597.

<sup>1</sup>*Morris v. Kelly*, 1 Jac. & W., 481. As to the right to enjoin the unauthorized publication of a play which plaintiff has not himself printed, but has only permitted to be represented at a theater for his

own benefit, see *Boucicault v. Hart*, 13 Blatch., 47.

<sup>2</sup>*Shook v. Rankin*, 3 Cent. L. J., 210, United States Circuit Court, District of Minnesota, 1875.

<sup>3</sup>*French v. Maguire*, 55 How. Pr., 471.

tators, who have been witnesses of its authorized representation upon the stage, the authorities are somewhat conflicting. By some most respectable courts countenance and approval have been given to the proposition that such memorization of a play or drama is lawful, and that equity will not restrain its reproduction through the sole medium or agency of the memory of witnesses or spectators. The doctrine as thus asserted is founded upon the assumption that the spectators of a public theatrical performance are entitled to use the faculty which is necessarily addressed by such representation, viz., the memory, for the purpose of preserving the play and reproducing it, when the owner has imposed no inhibition or restraint upon such method of retention and reproduction.<sup>1</sup> Upon principle, however, it is difficult to perceive any satisfactory reasoning upon which the doctrine can be supported. It is conceded that the reproduction of a drama by any other unauthorized means than the spectator's memory, as by taking it down in short-hand, is illegal and constitutes sufficient foundation for relief by injunction.<sup>2</sup> And no satisfactory distinction can be perceived between the use of short-hand or other like means of preserving the play, and its memorization as a means of reproduction; nor can any sufficient reason be assigned for refusing relief in the one case, and allowing it in the other. And the later and better considered authorities have denied the distinction above stated, and have established by express adjudication, what is certainly the true doctrine upon principle, that the taking and carrying away of an unpublished play by memory, from its representation upon the stage, and its reproduction without the owner's consent

<sup>1</sup> *Keene v. Kimball*, 16 Gray, 545. Rob. (N. Y.), 38; *Crowe v. Aiken*, 2 Amb., 208. And the same doctrine has been asserted or countenanced in the following cases, although it does not appear to have been necessary to a decision of the questions involved: *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Keene v. Kimball*, 16 Gray, 545; *Crowe v. Aiken*, 2 Biss., 208.

<sup>2</sup> See *Macklin v. Richardson*, Amb., 694; *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Keene v. Kimball*, 16 Gray, 545; *Crowe v. Aiken*, 2 Biss., 208.

constitute such an infringement of his proprietary rights as to entitle him to relief by injunction.<sup>1</sup>

§ 1044. The investigation of the doctrines governing equitable relief for the protection of dramatic compositions has thus far been principally with reference to cases where protection is sought for the common law or proprietary right in an unpublished drama, rather than to cases where protection is invoked in aid of dramatic copyright under the statutes. Where, however, instead of seeking protection for a dramatic composition upon the proprietary right in the unpublished manuscript, the owner of the play seeks to protect it as a copyrighted work under the statutes, he must show a compliance with the conditions fixed by stat-

<sup>1</sup>French v. Conelly, 1 N. Y. Weekly Dig., 196; Palmer v. DeWitt, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, affirmed on appeal, 47 N. Y., 532. And see especially the opinion of Monell, J., in Palmer v. DeWitt, as reported in 2 Sweeny and 3 Albany Law Journal. In French v. Conelly, Curtis, J., very clearly enunciates the true doctrine as follows, p. 197: "The next claim of the defendants is, that even if their version was made from memory, or a witnessing the representation upon the stage of the original play, they have the right to avail themselves of this course. The Court of Appeals, all the judges concurring, held in Palmer v. DeWitt, 47 N. Y., 532, that the property of an author or his assigns in an unpublished MS. is protected and governed by its use, enjoyment and transfer, the same as other personal property, and that the representation upon the stage of a dramatic composition did not affect the MS. and the rights of the author therein, and

was not an abandonment or dedication of it to the public; but the court did not pass upon the question how far a spectator witnessing a play might lawfully commit it to memory and then publish it to the world. Learned judges have differed upon this latter question; but it would seem to better accord with justice and good morals that the carrying away in memory, or in the stenographic notes of a spectator, of the contents of a play unauthorized by the owner, is an infringement of his proprietary rights. It is a surreptitious mode of procuring the literary property of another, and when done from motives of gain, at the expense of the owner, is not defensible. \* \* These views were sustained by the majority of the judges at the General Term of this court in Palmer v. DeWitt, 2 Sweeny, 530, and seem to be applicable to so much of the case as rests upon the statements of the defendant Pillett as to what he reproduced in the defendant's version from memory."

ute as necessary to a valid copyright in a published work. Not only is it necessary that the title-page should be filed in advance of publication, as required by law, but the work must be actually published within a reasonable time after filing the title-page, and two copies of the published work must be sent to the Librarian of Congress as required.<sup>1</sup> Where, therefore, the title-page was filed in October, 1874, and the bill for injunction, which was filed in February, 1875, failed to allege any publication of the work, or any delivery of printed copies after publication to the Librarian of Congress, the bill was held demurrable because of such omission. Nor is it a sufficient averment of compliance with the statute in this respect to allege in the bill in general terms, that plaintiff has in all respects complied with the requirements of the statute, since this is not an averment of fact, but only of a legal conclusion or inference.<sup>2</sup> But upon a bill to enjoin the piracy of a copyrighted play, under the former statute requiring a deposit of the title-page with the clerk of the United States District Court for the district, the certificate of the clerk that the title had been deposited in conformity with the act of Congress was held to be *prima facie* evidence that the title deposited was such as the statute required.<sup>3</sup>

§ 1045. One who has copyrighted a dramatic composition under a given title, such as the word "Charity," can not enjoin another from producing an entirely different play under a similar title, in the absence of bad faith, the use of such word as a designation of any work of literature or art not being subject to be monopolized by any one person.<sup>4</sup>

<sup>1</sup> *Boucicault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150, 8 Chicago Legal News, 257; *Carillo v. Shook*, 22 Int. Rev. Rec., 152; S. C., 8 Chicago Legal News, 258. But see, *contra*, *Roberts v. Meyers*, 23 Monthly Law Reg., 396; *Boucicault v. Fox*, 5 Blatch., 87; *Boucicault v. Wood*, 2 Biss., 34. See

also *Shook v. Rankin*, 6 Biss., 477; S. C., 8 Chicago Legal News, 345.

<sup>2</sup> *Boucicault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150, 8 Chicago Legal News, 257.

<sup>3</sup> *Roberts v. Meyers*, 23 Monthly Law Reg., 396.

<sup>4</sup> *Isaacs v. Daly*, 39 N. Y. Superior Ct., 511.



So a person who deposits in the office of the Librarian of Congress the title of a drama not original with himself, but which is taken from a novel of the same title, can not thereby secure to himself such title to the exclusion of others who have applied the same title to a dramatic composition founded upon the same story, before the date of such deposit; and the plaintiff, in such case, will be denied relief by injunction against the representation by defendant of his play under the title in question.<sup>1</sup>

§ 1046. When the owner of the copyright in a dramatic composition writes a novel founded upon such play and transfers to the novel several scenes from the play, and defendant afterward dramatizes the novel, taking the same scenes therefrom, he is guilty of such an infringement as to justify relief by injunction.<sup>2</sup> If, however, plaintiff fails to make sufficient proof of his title, either by authorship or purchase, and the facts indicate that his play is merely a colorable imitation of that which he seeks to enjoin, the relief will be denied. So if it appears to the court that both parties are wrong-doers and *in pari delicto*, equity will decline to interfere.<sup>3</sup>

§ 1047. The authorities are not wholly reconcilable as to the right to relief by injunction for the protection of merely scenic or spectacular effects upon the stage, independent of literary composition. Upon the one hand, it is held that mere spectacles or arrangements of scenic effects, commonly called spectacular dramas, without literary character, are not dramatic compositions within the meaning of the act of Congress so as to entitle them to protection as literary property, and that equity will not, therefore, interfere by injunction for their protection.<sup>4</sup> If the refusal

<sup>1</sup> *Benn v. Leclercq*, 18 Int. Rev. Rec., 94.

<sup>2</sup> *Reade v. Lacy*, 1 Johns. & H., 524; S. C., 30 L. J. N. S. Ch., 655.

<sup>3</sup> *Martinetti v. Maguire*, 1 Abb. U. S. R., 356; S. C., 1 Deady, 216.

<sup>4</sup> *Martinetti v. Maguire*, 1 Deady, 216; S. C., 1 Abb. U. S. R., 356, where an injunction was refused which was sought to restrain the reproduction of the spectacular play known as the "Black Crook."

to interfere in such cases is based upon the immoral or indecent nature of the spectacle in question, the doctrine is not inconsistent with either principle or authority.<sup>1</sup> But it is difficult to perceive any satisfactory reason why particular and striking scenes or stage effects of a drama, not of an immoral or indecent nature, are not entitled to the same protection in equity as the purely literary portions of the play. And the true doctrine undoubtedly is that the protection which is extended to dramatic compositions is not limited to the dialogue or literary part of the composition, but extends also to scenic effects and particular scenes or stage situations, and that there may be such a piracy of a particular scene from a play as to warrant relief by injunction. And when all that is substantial and material in a scene from plaintiff's copyrighted play is taken by defendant and used in the same order and sequence of events, and in such manner as to convey the same sensations and im-

<sup>1</sup> In *Martinetti v. Maguire*, *supra*, the refusal to interfere was also based upon the immorality and indecency of the spectacle in question. "The Black Crook," says Deady, J., "is a mere spectacle—in the language of the craft, a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and, as witness Hamilton expresses it, consists mainly 'of women lying about loose,' a sort of Mohammedan paradise, I suppose, with imitation grottoes and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artists, might as justly be called a dramatic composition. Like those, this is a spectacle; and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women 'lying about loose,' or otherwise, is not a dramatic composition, and therefore not entitled to the protection of the copyright act." It is, however, to be observed, that *Martinetti v. Maguire* was decided under the act of Congress of August 18, 1856, 11 Statutes at Large, 138, which granted protection to dramatic compositions "designed or suitable for representation." These words are not found in the act of July 8, 1870, now embodied in the Revised Statutes.

pressions upon spectators as the corresponding scene in plaintiff's play, equity will interpose by injunction to prevent such a piracy upon plaintiff's rights.<sup>1</sup>

<sup>1</sup> *Daly v. Palmer*, 6 Blatch., 256. Plaintiff in this case, being the owner of a copyrighted play known as "Under the Gaslight," filed a bill to enjoin defendant from producing a play called "After Dark," the injunction being especially sought to prevent defendant from representing in his play a particular scene known as the "railroad scene" in "Under the Gaslight." In plaintiff's play this scene represented a surface railroad, a woman locked in a signal station by the signal man, a man binding another to the track to be killed by the approaching train, the woman seeing this from a window, breaking open the door with an ax and rescuing the victim from the coming train. Defendant, in "After Dark," produced a scene in which a man thrown into a wine vault sees through a door leading into an adjoining vault two persons put the body of a man, rendered unconscious by drugs, through a hole in the wall, whom they leave insensible upon the track of an underground railway. The man confined enlarges, with an iron bar, an opening in the wall of the vault, and removes the body from the track, a moment before the train passes. The injunction was allowed, Blatchford, J., saying, p. 269: "All that is substantial and material in the plaintiff's 'railroad scene' has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it repre-

sented, as in the plaintiff's play. Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and in doing so has evinced skill and art; but the same use is made in both plays of the same series of events, to excite by representation the same emotions in the same sequence. There is no new use, in the sense of the law, in B.'s play, of what is found in the plaintiff's 'railroad scene.' The 'railroad scene' in B.'s play contains everything which makes the 'railroad scene' in the plaintiff's play attractive as a representation on the stage. As in the case of a musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of a dramatic composition designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language of the first play, is like the adaptation of the musical air to a different instrument, or the

§ 1048. It would seem that if the play for whose protection the aid of equity is invoked is an immoral production, the court will not lend its aid by injunction to prevent its infringement, since the rights of the author are secondary to the right of the public to be protected from what is subversive of good morals.<sup>1</sup> But when, upon an examination of the original manuscript of plaintiff's play, the charge of immorality is not sustained, the infringement of the play will be enjoined.<sup>2</sup>

§ 1049. The doctrine of equitable protection as extended in favor of the common law or proprietary right in an unpublished drama in manuscript, independent of statute, has already been fully considered. Under the act of Congress of July 8, 1870, provision is made for the protection of un-

addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind in the same sequence or order. Tested by these principles, the 'railroad scene' in B.'s play is undoubtedly when acted, performed, or represented on a stage or public place, an invasion or infringement of the copyright of the plaintiff in the 'railroad scene' in his play. The substantial identity between the two scenes would

naturally lead to the conclusion that the later one had been adapted from the earlier one. The charge of actual plagiarism on the part of B. made in the bill is not denied. It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable with the view to disguise the plagiarism. The true test of whether there is a piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a *bona fide* original compilation, made up from common materials and common sources, with resemblances which are merely accidental or result from the nature of the subject. *Emerson v. Davies*, 3 Story, 768, 793."

<sup>1</sup> *Shook v. Daly*, 49 How. Pr., 366; S. C., 1 N. Y. Weekly Dig., 198; *Martinetti v. Maguire*, 1 Deady, 216; S. C., 1 Abb. U. S. R., 356.

<sup>2</sup> *Shook v. Daly*, 49 How. Pr., 366; S. C., 1 N. Y. Weekly Dig., 198.

published manuscripts, thus affirming by statute the common law right.<sup>1</sup> And under this statute the printing and publishing by defendant of a considerable portion of plaintiff's manuscript play, and the announcement of his intention to sell copies of the same, constitute sufficient ground for enjoining such printing and publication.<sup>2</sup>

§ 1050. The protection which is extended by courts of equity to authors under the copyright laws is not limited to original works, but extends also to translations. When, therefore, a foreign play has been translated into English and adapted to the stage and copyrighted in this country, with the author's consent, the owner of the copyright in such translation is entitled to an injunction to restrain a piracy upon his work.<sup>3</sup>

§ 1051. An injunction is proper to restrain the publication in a magazine of a play which the author has kept in manuscript and never published, and which he has not allowed to be acted upon the stage except with his permis-

<sup>1</sup>The provision in question is found in Section 4967 of the Revised Statutes, which enacts that, "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury."

<sup>2</sup>*Boucicault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150.

<sup>3</sup>*Shook v. Rankin*, 6 Biss., 477; S. C., 8 Chicago Legal News, 345. Drummond, J., in granting the injunction, says, 6 Biss., p. 479; "D'Ennery and Cormon were the authors of a drama in the French language called 'Les Deux Orpheles'; Jackson translated it into English and adapted it to representation on the stage. This was

with the consent of the authors. After this was done he applied under the law for a copyright; and the question is whether there was any valid objection to his obtaining a copyright for the play thus translated into English. I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was, in the sense of the law, the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author."

sion.<sup>1</sup> But a perpetual injunction has been refused against the publication of a periodical work devoted to theatrical criticism, in which defendant had published certain extracts from plaintiff's play with criticisms thereon, the case being regarded as not sufficiently free from doubt to warrant the relief.<sup>2</sup>

§ 1052. An application for a preliminary injunction to restrain the production of an unpublished play upon the stage has been refused, upon defendants depositing a sum of money equal to the amount for which plaintiff had been willing to license the performance of the play by defendants, with a sufficient sum in addition thereto to cover the costs of the litigation.<sup>3</sup>

<sup>1</sup> *Macklin v. Richardson*, Amb., 694.

<sup>3</sup> *Keene v. Wheatley*, 9 Am. Law Reg., 33.

<sup>2</sup> *Whittingham v. Wooler*, 2 Swanst., 428.

## IV. MUSICAL COMPOSITIONS.

§ 1053. Test to be applied.

1054. What constitutes an author; infringement of opera.

1055. Piracy of song enjoined; when action at law required.

1056. Effect of laches.

§ 1053. The general principles which have been already discussed, as governing equitable interference for the protection of literary and dramatic compositions, are believed to be equally applicable to cases where it is sought to protect a musical composition from piracy or infringement, although the aid of equity has been less frequently invoked in the latter class of cases than in the former. The true test to be applied in determining whether such a piracy has been committed upon a musical composition as to entitle plaintiff to relief by injunction is, whether the music appropriated by defendant may be recognized by the air as that of plaintiff, and whether the air which is taken is substantially the same as the original. And the publication by defendant in the form of waltzes and quadrilles of a considerable and material portion of the air of plaintiff's copyrighted opera, constitutes such an infringement of plaintiff's rights as will be enjoined, even though defendant may have made material additions to the air and adapted it to a different purpose from the original.<sup>1</sup>

<sup>1</sup> *D'Almaine v. Boosey*, 1 Y. & C. Exch., 288. Lord Chief Baron Lyndhurst says, p. 300: "It is admitted that the defendant has published portions of the opera containing the meritorious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, although he does fifteen other bars which are not to be found in it. Now it is said that this is not a piracy: first,

because the whole of each air has not been taken; and secondly, because what the plaintiffs purchased was the entire opera, and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *a fortiori* they were entitled to publish the melodies which

§ 1054. To constitute one an author within the meaning of the copyright law, he must, by his own individual labor applied to the materials of his composition, produce an arrangement or compilation new in itself. And where one takes the music of an opera as written and produced in Europe, and makes alterations and additions thereto, and adapts and arranges it, adding new matter of his own and thus producing a new and different result, which he then copyrights, he is entitled to relief in equity.<sup>1</sup> But a dramatic representation by defendants upon the stage, in which a substantial and material part of the music of an opera owned by plaintiff and duly copyrighted is performed, con-

form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the melody belongs to the original composition. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Every compiler intends to make of them a new use; not that which the author proposed to make. \* \* \* Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him: but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the au-

thor, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole melodious part of the invention consists. \* \* \* It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and a mere adaption of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in principle."

<sup>1</sup> Atwill v. Ferrett, 2 Blatch., 39.



stitutes such an infringement of plaintiff's sole right of performing such music as to justify an injunction; and this is true, even though the operatic score as produced by defendants was obtained by independent labor bestowed upon a pianoforte arrangement of the music, which was made by another person and not copyrighted.<sup>1</sup> Where, however, the libretto and score of a comic opera composed by non-resident alien authors had been published and thereby dedicated to the public, although the orchestration of the opera had been retained in manuscript, and defendant had independently prepared a new orchestration from the published vocal and pianoforte scores, the court refused to enjoin defendant from producing the opera with such orchestration. But it was held, in such case, that defendant might be restrained from so advertising his performance as to lead the public to believe that his orchestration was the original one.<sup>2</sup>

§ 1055. Where the plaintiffs, who were publishers of music in England, published an original song, which was written and composed for them and set to the music of an old American air re-arranged for their song, the song being published by plaintiffs under a particular title as sung by a famous singer, whereby it had become very successful and popular, plaintiffs were held to have a property in the title and description of the song. And defendants having pub-

<sup>1</sup> *Boosey v. Fairlie*, 7 Ch. D., 301. The Court, Thesiger, L. J., say, p. 317: "Upon the third point, viz., that of infringement, we are of opinion that a dramatic representation in which a substantial and material part of the music of Offenbach's opera has been performed, constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labor bestowed upon the unprotected pianoforte arrangement of Soumis.

There is scarcely any published opera the score of which is not, within a short time after its first performance, arranged for the piano, and if by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory."

<sup>2</sup> *Iolanthe Case*, 15 Fed. Rep., 439.

lished substantially the same melody, with different words but with a similar title-page announcing the song under a similar name and as sung by the same person, an injunction was allowed to restrain such infringement upon plaintiff's rights. But the right to relief in such case rests upon the deception on the part of defendants in holding their goods out to the public as those of plaintiffs, rather than upon any copyright in the production itself.<sup>1</sup> The court may, however, in such case, as a condition of continuing the injunction, require plaintiffs to bring an action at law and to enter into an undertaking to be answerable in damages.<sup>2</sup> And where it is sought to restrain the infringement of a musical composition, but the evidence is conflicting as to the originality of the work, a decision upon the question of the injunction may be suspended or withheld, in order that an issue at law may be tried to test the question of fact.<sup>3</sup>

§ 1056. Upon the question of plaintiff's acquiescence or laches as affecting his right to equitable relief in the class of cases under consideration, it is held that where he has permitted several persons to publish his musical compositions, some of them for a period of fifteen years, while such laches is not of itself a justification of the infringement, it is a circumstance which will lead a court of equity to refuse its aid by injunction in the first instance.<sup>4</sup> And although the *onus* of proving such laches on the part of plaintiff as to estop him from relief by injunction rests upon defendant in the first instance, yet if laches be shown plaintiff must purge himself therefrom before he will be allowed preventive relief.<sup>5</sup>

<sup>1</sup> Chappell v. Sheard, 2 Kay & J., 117; S. C., 1 Jur. N. S., 996, 3 W. R., 646; Chappell v. Davidson, 2 Kay & J., 123.

<sup>2</sup> Chappell v. Davidson, 8 DeG., M. & G., 1.

<sup>3</sup> Jollie v. Jaques, 1 Blatch., 618.

<sup>4</sup> Platt v. Button, 19 Ves., 447.

<sup>5</sup> Chappell v. Sheard, 1 Jur. N. S., 996; S. C., 2 Kay & J., 117, 3 W. R., 646.

## V. PARTIES.

- § 1057. Assignee entitled to protection.
- 1058. Executors of law reporter.
- 1059. When publisher protected as assignee.
- 1060. Equitable owner protected.
- 1061. Author, publisher and assigns.
- 1062. Vendor of infringing work enjoined.

§ 1057. The question of who are proper parties, plaintiff or defendant, for or against whom a court of equity will interfere by injunction for the protection of copyright, frequently becomes one of practical importance in this class of cases. The right to relief by injunction is not limited to the author or original proprietor of a literary or dramatic work, but extends to his assignee, who will be protected in a proper case in like manner and to the same extent that the author himself would have received protection.<sup>1</sup> And when the author of a copyrighted drama assigns the exclusive right to act and represent it in all places throughout the United States, except certain specified localities, for a given period, such assignee is entitled to relief by injunction against an invasion of his right by a defendant who is proceeding without color of authority to produce the play in question; nor in such case is the assignor a necessary party to the action.<sup>2</sup>

§ 1058. Where the reporter of law reports contracts with publishers to furnish his reports in manuscript, the publishers to have the copyright to themselves, their heirs and assigns, at a fixed consideration, such agreement will be held to vest the full right of property in the publishers, with the right to renewals under a law subsequently passed providing for an extension of copyright. The executors of such reporter can not, therefore, after his decease, maintain a bill to enjoin such publishers from publishing and selling, especially when the reporter, in his life-time, had for

<sup>1</sup> Crowe v. Aiken, 2 Biss., 208.

<sup>2</sup> Roberts v. Meyers, 23 Monthly Law Reg., 396.

many years acquiesced in the assertion by defendants of their right to publish and sell under the renewal of the copyright.<sup>1</sup>

§ 1059. In the case of a contract between an author and publisher for the publication by the latter of a certain number of copies of a work, which in effect gives him its sole publication to the extent of the edition embraced in such contract, the publisher may be treated as an assignee of the copyright in a limited sense, and as such entitled to maintain a bill to enjoin a piracy of the work. And the fact that those portions of the work which have been pirated are contained in previous editions of the same work by the same author will not prevent relief by injunction, when such passages are also contained in the edition in question, and when the entire copyright in all the editions was vested in the author at the time of making such agreement.<sup>2</sup>

§ 1060. The province of courts of equity being to afford relief in cases where no remedy exists at law, or where the legal remedy, if any, is inadequate or incapable of being enforced, the possession of the legal title is not indispensable to obtaining relief in equity against the infringement of a copyright, and the courts have been disposed to extend their aid upon the application of persons having only an equitable title.<sup>3</sup> And the assignee of the copyright in a law report is entitled to the protection of his rights by injunction, even though at the time of the alleged piracy no written assignment existed, and complainant's title was merely equitable. And in such case, the author's permission to infringe the copyright, given after he has parted with his equitable title for a valuable consideration, constitutes no bar to the relief, it appearing on the title-page of

<sup>1</sup> *Paige v. Banks*, 13 Wal., 608, affirming S. C., 7 Blatch., 152.

<sup>2</sup> *Sweet v. Cater*, 11 Sim., 572.

<sup>3</sup> *Mawman v. Tegg*, 2 Russ., 385; *Chappell v. Purday*, 4 Y. & C., 485; *Hodges v. Welsh*, 2 Ir. Eq. R., 266. But see *Colburn v. Duncombe*, 9

Sim., 151, where it is held that if the plaintiff's title for which protection is sought by injunction is merely equitable, the owner of the legal title should be joined as a party to the action.

the work that it is published for the equitable assignee and owner of the copyright.<sup>1</sup> So the performance of a play may be enjoined when the copyright has been assigned by the author to persons who afterward assign in writing to complainants, although the original assignment may not have been in writing.<sup>2</sup>

§ 1061. Where an author and publisher entered into a contract for the publication of a book, the profits to be divided equally between them, it was held that assignees or purchasers claiming title under the publishers were not entitled to enjoin the author from publishing a new edition of the book with another publisher, the agreement in question being treated as of a personal nature, the benefit of which was not assignable by either party without the consent of the other.<sup>3</sup>

§ 1062. Relief by injunction may properly be allowed against the vendor of a book which constitutes a piracy of plaintiff's work, the vendor in such case being liable for the sale of a book which invades the plaintiff's copyright upon the same principle which renders the vendor of a patent liable for selling the manufactured article without the consent of the patentee.<sup>4</sup>

<sup>1</sup> *Hodges v. Welsh*, 2 Ir. Eq., 266. & G., 223, affirming S. C., 1 Kay &

<sup>2</sup> *Morris v. Kelly*, 1 Jac. & W., J., 168.

431.

<sup>4</sup> *Greene v. Bishop*, 1 Clif., 186.

<sup>3</sup> *Stevens v. Benning*, 6 DeG., M.

## CHAPTER XVIII.

### OF INJUNCTIONS AGAINST THE INFRINGEMENT OF TRADE MARKS.

I.	NATURE OF THE RIGHT AND ITS INFRINGEMENT . . . . .	§ 1063
II.	PRINCIPLES GOVERNING THE RELIEF . . . . .	1085
III.	PARTIES . . . . .	1102

#### I. NATURE OF THE RIGHT AND ITS INFRINGEMENT.

- § 1063. Nature of trade mark.
- 1064. Name of place of manufacture.
- 1065. The same.
- 1066. The same; street name and number; name of residence.
- 1067. Unmeaning symbol; different class of goods; colorable differences.
- 1068. Manufacturer protected; system of numbers; letters; general principles.
- 1069. Use of one's own name enjoined.
- 1070. When not enjoined.
- 1071. Use of letters; fanciful name.
- 1072. Word from foreign language; "original."
- 1073. Expiration of patent.
- 1074. "Cough remedy;" "Rock and Rye."
- 1075. Medical preparation; blacking.
- 1076. Form, color, size and shape of packages.
- 1077. Brand; wrappers; omnibus; hotel.
- 1078. Title of literary production, magazine or paper.
- 1079. Newspapers; songs.
- 1080. Firm name and trade mark; sale of business, good-will and name.
- 1081. Corporate name protected.
- 1082. Name of mineral water protected.
- 1083. Relief against former employe.
- 1084. Accounting.

§ 1063. A trade mark is a particular sign or symbol which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods, and for the protection

of which the aid of equity may be properly invoked. It is not necessary that the article should have acquired a general notoriety in the market, by the use of the particular mark adopted, but the right may be established whenever the goods are brought into the market.<sup>1</sup> If the marks or devices used refer simply to the nature, kind, or quality of the articles, and do not designate the particular goods of the owner, or his particular place of business, he can not acquire such a property in the words or symbols used as to warrant the interposition of equity.<sup>2</sup> Thus, if the name used is simply descriptive of the article, or is the name by which it is generally known in trade, or indicates the general nature of the business, it is not a trade mark within the meaning of the rule.<sup>3</sup> And where the term used is merely an adjective descriptive of the quality of the article manufactured by plaintiff, such as the word "nourishing" applied to his goods, it does not constitute such a trade mark as will be protected in equity by an injunction.<sup>4</sup> Nor does the protection which is afforded by the law of trade marks extend to the use of words which serve only to indicate the name, kind or quality of goods, even though they may be blended with other words indicative of origin or ownership. Where, therefore, the only matter common to both plaintiff's and defendant's label is the term "washing powder," which is the name of the article in question, an injunction will not be allowed, since plaintiff can acquire no exclusive property in the name by which like compounds

<sup>1</sup> *M'Andrew v. Bassett*, 33 L. J. M., 447; *Young v. Macrae*, 9 Jur. N. Ch., 561. S., 322. See also *Hostetter v. Fries*,

<sup>2</sup> *Stokes v. Landgraff*, 17 Barb., 17 Fed. Rep., 620. And see *London Society v. London Co.*, 11 Jur. 938; *Falkinburg v. Lucy*, 35 Cal., 52; *Raggett v. Findlater*, L. R. 17 Eq., 29; *Osgood v. Allen*, 1 Holmes, 185. *Rumford Chemical Works v. Muth*, 35 Fed. Rep., 524; *Colgan v. Danheiser*, 35 Fed. Rep., 150. And see *Osgood v. Allen*, 1 Holmes, 185.

<sup>3</sup> *Braham v. Bustard*, 1 Hem. & <sup>4</sup> *Raggett v. Findlater*, L. R. 17 Eq., 29. In this case the words for which protection was sought were "Nourishing London Stout."

are known in the market and the use of which is open to all.<sup>1</sup>

§ 1064. It may be stated as a general rule, subject to certain modifications to be hereafter noticed, that a manufacturer can not acquire such a property in the name of a town or place where his goods are manufactured as to entitle him to an injunction to prevent other manufacturers in the same town or place from using that name to designate the place of manufacture of their goods, in the absence of any piracy of plaintiff's own name.<sup>2</sup> But, although a manufacturer in selecting a term to designate his goods should select the name of a place familiarly known, yet if he imposes a new office or attribute upon the word, specially designating the origin and place of manufacturing the article, or specially designating his own manufactured article, without infringing upon previous use of the term by others, he is entitled to protection by injunction.<sup>3</sup> And where defendants use not only the name of the place of plaintiff's business, but also words indicating that they are proprietors of that business, the use of such words being calculated to deceive the public and purchasers and to enable defendants to sell their goods as those of plaintiffs, an injunction may be allowed.<sup>4</sup> So where plaintiffs' article has become well known in the trade as the product of a particular place and is designated by that name, and when plaintiffs have the exclusive right of importing the article from the place of its origin under that name, it is held that they have a trade mark in the name, and may enjoin defendant from selling a spurious article under the same name.<sup>5</sup> And a manufact-

<sup>1</sup> *Falkinburg v. Lucy*, 35 Cal., 52. And see *Gilman v. Hunnewell*, 122 Mass., 139.

<sup>2</sup> *Candee v. Deere*, 54 Ill., 439; *Blackwell v. Wright*, 73 N. C., 310. And see *Wotherspoon v. Currie*, 23 L. T. N. S., 443; *Amoskeag Co. v. Garner*, 55 Barb., 151; S. C., 6 Ab. Pr. N. S., 265; *Lea & Perrins v.*

*Deakin*, U. S. Cir. Ct. N. D. of Ill., 11 Chicago Legal News, 152.

<sup>3</sup> *Newman v. Alvord*, 49 Barb., 588; *Hirst v. Denham*, L. R. 14 Eq., 542.

<sup>4</sup> *Braham v. Beachim*, 7 Ch. D., 848.

<sup>5</sup> *Radde v. Norman*, L. R. 14 Eq., 348.



urer who has for many years used certain geographical names to designate his goods has been allowed to enjoin defendant from using the same names when the latter did not conduct his business in the localities designated by such names.<sup>1</sup> And the use of the words "Cromac Springs," as applied to aerated waters procured from springs at a locality named Cromac, has been protected by injunction, defendant using the name in such manner as to represent the waters prepared by him to be those of the plaintiff.<sup>2</sup>

§ 1065. In accordance with the general doctrine that the name of a particular place as applied to a manufactured article can not be appropriated as a trade mark, it is held that where a particular kind of table sauce, originally manufactured at Worcestershire and known by that name, has long been known in the market, so that the term "Worcestershire" has become a generic term for that species of sauce, plaintiffs, who reside in Worcestershire and manufacture the sauce there, can not enjoin the sale by defendant of a sauce under the same name, but manufactured by him elsewhere, when plaintiffs have knowingly acquiesced in such manufacture for many years. And when, in such case, plaintiffs have filed their bill against the principal in England, to restrain him from such manufacture and sale there, and have been denied an injunction in such action at the hearing upon the merits, such proceedings will constitute a bar to a subsequent action for an injunction brought by the same plaintiffs against the agent in this country of the defendant in the English suit.<sup>3</sup> Where, however, defendant, though manufacturing his sauce at another place, uses the same name as that of plaintiffs, with similar labels and wrappers, with the evident intention of deceiving purchasers by inducing them to believe that they are purchasing plaintiffs' sauce, an appropriate case is presented for relief by

<sup>1</sup> Pike M. Co. v. Cleveland S. Co.,  
35 Fed. Rep., 896.

<sup>3</sup> Lea v. Deakin, U. S. Circuit  
Court, Northern District of Illinois,

<sup>2</sup> Wheeler v. Johnston, 3 L. R.  
Ir., 284. 11 Chicago Legal News, 152.

injunction.<sup>1</sup> And a defendant may be enjoined from simulating plaintiff's labels by using the name of the locality where plaintiff manufactures in such manner as to deceive the public and to induce purchasers to believe that defendant's products are those of the plaintiff.<sup>2</sup>

§ 1066. While, as has already been shown, the use of a geographical name is not as a rule protected as a trade mark if it merely indicates the place of manufacture, yet where plaintiff's goods have long been popularly known by the name of the place of their manufacture, which name is afterward changed, and defendant then adopts the old name with the evident design of representing his goods as those of plaintiff, an injunction will lie to restrain such use of the name.<sup>3</sup> And upon principles analogous to those which govern in cases of trade marks, the good-will in the name of a place as designating a particular manufacture may be protected in equity. Hence one who has established and built up a profitable business at a particular place, and who has attached to the business a name indicating to the public the place where such business is conducted, acquires such a property in that name as a part of the good-will of his business as to entitle him to restrain its use by another. Thus, the use of the words "Number 10, South Water Street," as indicating the place of business of a manufacturer, has been protected by injunction, the words being a mere arbitrary designation, and not corresponding with any actual number.<sup>4</sup> It is held, however, that there can not be such an exclusive appropriation of a particular name as applied to one's residence or premises as to warrant relief by injunction against the use of such name by another.<sup>5</sup> An action for an injunction can

<sup>1</sup> *Lea v. Wolff*, 1 Thomp. & C., 626.

<sup>4</sup> *Glen & Hall M. Co. v. Hall*, 61

<sup>2</sup> *Anheuser-Busch Brewing Association v. Piza*, 24 Fed. Rep., 158. And see *Boulnois v. Peake*, 149; *Southern W. L. Co. v. Cary*, 13 Ch. D., 513, note.

25 Fed. Rep., 125.

<sup>5</sup> *Day v. Brownrigg*, 10 Ch. D.,

<sup>3</sup> *Seigert v. Findlater*, 7 Ch. D., 801.

294; *Street v. Union Bank*, 30 Ch. D., 156.

not, therefore, be maintained to restrain defendant from calling his house by the name of plaintiff's residence, in the absence of any improper or malicious intention upon the part of defendant.<sup>1</sup>

§ 1067. However unmeaning or absurd the mark or symbol used may be in itself, it may still be the subject of a trade mark and entitled to protection.<sup>2</sup> It is to be observed, however, that the right is limited to the use of the symbol with reference to a particular line of goods, so that its use in connection with a different class of goods is not deemed a piracy.<sup>3</sup> But since the imitation of a trade mark with partial differences, such as would not be observed by the public, effects the same injury as an entire counterfeit, it follows that any imitation, with only a colorable difference in some of the details, will be restrained.<sup>4</sup> Thus, where defendant's trade mark is in all respects similar to that of complainant, except only in the use of the name, the injunction will be allowed.<sup>5</sup>

<sup>1</sup>Day v. Brownrigg, 10 Ch. D., 294.

<sup>2</sup>Perry v. Truefitt, 6 Beav., 66; Braham v. Bustard, 1 Hem. & M., 477.

<sup>3</sup>Leather Cloth Co. v. American Leather Cloth Co., 33 L. J. Ch., 199; Hall v. Barrows, Ib., 204; Braham v. Bustard, 1 Hem. & M., 447.

<sup>4</sup>Clark v. Clark, 25 Barb., 76; Brooklyn White Lead Co. v. Masury, Ib., 416; Williams v. Spence, 25 How. Pr., 366. And see Gillott v. Esterbrook, 47 Barb., 455. In Brooklyn White Lead Co. v. Masury, 25 Barb., 416, the plaintiff, an incorporated company, had been engaged for over twenty years in manufacturing white lead in the city of Brooklyn, and was accustomed to mark its kegs "Brooklyn White Lead Company," or "Co." Defendant was engaged in the same business, and at the same

place, though established for a less period of time, and the imitation complained of was in marking his kegs "Brooklyn White Lead and Zinc Company." The injunction was sustained on appeal to the Supreme Court, Mitchell, P. J., saying: "It is to protect the plaintiff's right of selling his own that the law of trade marks has been introduced. It must include a right to sell to all—to the incautious as well as to the cautious. Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." The injunction was, however, modified so as to prevent the use of the word "Company," or "Co.," allowing the use of the remaining words.

<sup>5</sup>Gillott v. Esterbrook, 47 Barb., 455; Hostetter v. Vowinkle, 1 Dill,

§ 1068. It may be laid down as a general rule that a manufacturer, adopting a certain trade mark and stamping it upon his goods, acquires the exclusive right to the use of that particular mark or symbol in connection with that particular class of goods, and that he is entitled to the interposition of a court of equity to enforce this right by perpetual injunction.<sup>1</sup> Even a system of numbers, if adopted and used for the purpose of designating the manufacturer's particular goods, comes within the rule and is entitled to protection.<sup>2</sup> So the use by a manufacturer of an arbitrary combination of figures, such as "830," to designate a particular class of goods may be protected by injunction.<sup>3</sup> But

329. In this case an injunction was allowed to restrain an imitation of complainant's label, resembling the original in all respects, except that the word "Hostetter" was changed to "Holstetter" and the words "Hostetter & Smith" were changed to "Holstetter & Smyth." The principles applicable to the infringement of trade marks are well laid down in this case by Dillon, J., as follows: "The law is well settled that a party who has appropriated a particular trade mark to distinguish his goods from other similar goods has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it, by injunction, from invasion, and if it has been invaded the wrong-doer is liable for the damage he has thereby caused the party whose trade mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. *Candee et al. v. Deere et al.*, 54 Ill., 439; S. C., 10 Am. Law Reg. (N. S.), 694; *Motley v. Downman*, 3 Myl. & Cr., 1; Mil-

lington *v. Fox*, Ib., 333; *Eden on Injunc.*, ch. 14, p. 314; *Story Eq. Jurisp.*, § 951; *Taylor v. Carpenter*, 2 Woodb. & M., 1; *Walton v. Crowley*, 3 Blatch., 440; *Coffeen v. Brunton*, 4 McLean, 518; *Seixo v. Provezende*, 1 Ch. Ap., 194; *Amoskeag Manuf'g Co. v. Spear*, 2 Sandf. S. C. R., 606; *Filley v. Fassett*, 8 Am. Law Reg. (N. S.), 402, 44 Mo., 168, and cases cited; *Gillott v. Esterbrook*, 47 Barb., 469; *Burnett v. Phalon*, 9 Bosw., 192; *Croft v. Day*, 7 Beav., 89; *Edleston v. Vick*, 23 Eng. C. L. & Eq., 53. These cases and others also show that it is not necessary to constitute an illegal infringement that the trade mark of the originator should be copied in every particular. It is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator, or make it pass with the public as his."

<sup>1</sup> *Taylor v. Carpenter*, 11 Paige, 292, affirmed by the court for the correction of errors; *Hostetter v. Vowinkle*, 1 Dill., 329.

<sup>2</sup> *Ainsworth v. Walmsley*, 1 L. R. Eq., 518.

<sup>3</sup> *Shaw S. Co. v. Mack*, 21 Blatch., 1; S. C., 12 Fed. Rep., 707.

letters and numbers, or a combination of letters and numbers, used for the purpose of designating the size, shape and quality of a manufacturer's goods, do not constitute a trade mark and are not entitled to protection in equity.<sup>1</sup> The jurisdiction rests upon fraud on the part of the defendant,<sup>2</sup> and upon the principle that equity will not allow one to sell his own goods under the pretense that they are the goods of another.<sup>3</sup> And in addition to such a general resemblance of forms, words and symbols as to mislead the public, there must be, to constitute a piracy, such a distinctive individuality as to procure for the person the benefit of the deception which such general resemblance will produce.<sup>4</sup> It is wholly immaterial whether the simulated article is or is not inferior to or of equal quality with the genuine.<sup>5</sup> But the injunction will not be granted where its effect would be to restrain the sale of a genuine article and aid in the sale of a simulated one.<sup>6</sup> Nor will equity inter-

<sup>1</sup> *Candee v. Deere*, 54 Ill., 439; S. C., 10 Am. Law Reg. N. S., 694; *Manufacturing Co. v. Trainer*, 101 U. S., 51.

<sup>2</sup> *Delaware & H. Canal Co. v. Clark*, 7 Blatch., 112.

<sup>3</sup> *Perry v. Truefitt*, 6 Beav., 66. Lord Langdale, Master of the Rolls, observes: "I think that the principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he can not be permitted to practice such a deception, nor to use the means which contribute to that end. He can not, therefore, be allowed to use names, marks, letters or *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own

it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

<sup>4</sup> *Croft v. Day*, 7 Beav., 84; *Colladay v. Baird*, 7 Upper Canada Law Journal, 132.

<sup>5</sup> *Taylor v. Carpenter*, 11 Paige, 292; *Coats v. Holbrook*, 2 Sandf. Ch. R., 586.

<sup>6</sup> *Samuel v. Berger*, 24 Barb., 163; S. C., 4 Ab. Pr., 88; S. C. *sub nom.* *Samuel v. Buger*, 13 How. Pr., 342.

fere where defendant has acted under such acquiescence on the part of complainants as is equivalent to a license.<sup>1</sup>

§ 1069. The protection afforded by courts of equity against the infringement of trade marks is not dependent upon any exclusive right to a particular name or to a precise form of words. The right to relief is rather dependent upon the necessity of extending protection against the commission of fraud, and this fraud may consist in the use of a name to which defendant is entitled, if such use be coupled with other circumstances rendering it an infringement of complainant's rights. Thus, where defendant has used his own name in a trade mark, to restrain the use of which an injunction is prayed, but has used it in such a connection and under such circumstances as are calculated to mislead the public and to enable him to obtain for himself a benefit to which he is not entitled in equity and good conscience, he will be enjoined from such use.<sup>2</sup> Nor will

<sup>1</sup> *Delaware & H. Canal Co. v. Clark*, 7 Blatch., 112.

<sup>2</sup> *Croft v. Day*, 7 Beav., 84; *Fullwood v. Fullwood*, 9 Ch. D., 176. See also *James v. James*, L. R. 13 Eq., 421; *Landreth v. Landreth*, 22 Fed. Rep., 41. *Croft v. Day*, 7 Beav., 84, was a bill for an injunction under the following circumstances: An establishment for the manufactory of blacking had for many years been carried on under the name of Day & Martin, at 97 High Holborn, London. Upon the death of Day and Martin, the business was conducted by Day's executors in the same name. A nephew of the deceased Day applied to another person named Martin for permission to use his name in the manufacture and sale of blacking, and permission was granted. Day then commenced the manufacture of blacking at 90½ Holborn Hill, and sold his blacking under the

name of Day & Martin, using similar bottles and almost identical labels with those used by the original Day & Martin, the labels being of exactly the same size and color and with the letters arranged in precisely the same manner. The injunction was allowed, Lord Langdale, Master of the Rolls, saying: "The accusation which is made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said that the principle, in these cases, is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man

one be allowed to use his family name in connection with his article of manufacture, with such slight changes as to

has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would

not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practicing the deception by preserving his own individuality. There are many distinctions, even more than have been stated, between these two labels. It is truly said, that if any one takes upon himself to study these two labels he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calculated to effect that purpose, and the defendant must be restrained. My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact

mislead the public and to secure a trade intended for and supposed by purchasers to be given to the original person of that name.<sup>1</sup> So where the name of a partner has been used as a trade mark to designate the goods manufactured by the firm, and such partner sells his interest in the business and trade mark, he may be enjoined from afterward using his name to designate similar goods manufactured by himself.<sup>2</sup> And where the surname of plaintiffs and of defendant was the same, and defendant had been enjoined from using the firm name of the plaintiffs in such manner as to mislead the public, or to induce them to believe that he was the plaintiffs, and thereupon the defendant made a merely colorable change in the arrangement of the name, which was still calculated to deceive the public, he was held guilty of a contempt in violating the injunction.<sup>3</sup> But where two persons of the same name manufacture the same article, calling it by their names, the later manufacturer will not

of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction restraining the defendant from carrying on that deception. He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage."

<sup>1</sup> *Gouraud v. Trust*, 6 Thomp. & C., 133. In this case defendants were plaintiff's sons, but having a different surname, and plaintiff had been for many years engaged in manufacturing and selling a cosmetic designated and labeled as "T. Felix Gouraud's Oriental Cream and Magical Beautifier." Defendants began the manufacture of a cosmetic which they designated and labeled "Creme Orientale, by Dr. T. F. Gouraud's Sons," and an injunction was allowed.

<sup>2</sup> *Russia Cement Co. v. Le Page*, 147 Mass., 206.

<sup>3</sup> *Devlin v. Devlin*, 69 N. Y., 212, affirming S. C., 67 Barb., 290, 4 Hun, 651. But Church, C. J., in delivering the opinion, observes that the case "sails very close to the wind," and costs were denied to either party as against the other in the Court of Appeals.



be enjoined in the absence of evidence that he has represented his own article as that of the elder manufacturer.<sup>1</sup>

§ 1070. But in the absence of fraud or deceit, plaintiff and defendant both having the same surname, equity will not enjoin defendant from using his name in the pursuit of his lawful business, even though such use by defendant results in injury to plaintiff; since there can not, under such circumstances, be a trade mark in the surname which will prevent defendant from its use.<sup>2</sup> So one may use his own name in describing a manufactured article, or may permit a company incorporated for the manufacture of the article to use that name, and such company will not be enjoined if the name is used in connection with the article in such manner as not to lead the public to believe that they are buying the article manufactured by plaintiff under the same name, no fraud or deceit being shown.<sup>3</sup>

§ 1071. The use of certain letters of the alphabet in connection with an article of sale, which letters have no meaning in themselves as applied to the article in question, but are only used to designate it as belonging to plaintiff, when continued for many years so that the article becomes known in the market and identified by those letters, creates such a trade mark as entitles the owner to relief by injunction against its piracy.<sup>4</sup> And the use by plaintiff of a fanciful name, such as "Eureka," applied to his wares, whereby they become generally known and acquire a favorable reputation in the market, will entitle him to protection in equity in the use of such name.<sup>5</sup> So the use of the word "Parabola" printed upon packages of needles manufactured and sold by plaintiffs, under which name their needles have acquired a wide celebrity and an extensive sale, con-

<sup>1</sup> *Burgess v. Burgess*, 3 DeGex, 367; S. C., 3 Thomp. & C., 540. M. & G., 896; S. C., 17 Eng. L. & Eq., 257. And see *Holloway v. Holloway*, 13 Beav., 209.

<sup>2</sup> *Meneely v. Meneely*, 1 Hun,

See also *Olin v. Bate*, 98 Ill., 53.

<sup>3</sup> *Massam v. Thorley's Cattle Food Co.*, 6 Ch. D., 574.

<sup>4</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75.

<sup>5</sup> *Ford v. Foster*, L. R. 7 Ch., 611.

stitutes such a trade mark as to entitle them to enjoin defendant from using the same word upon his packages of needles. And the fact that defendants have also used their firm name as manufacturers in connection with such word, instead of using plaintiffs' name, will not defeat plaintiffs' right to the exclusive use of the word nor debar them from relief by injunction.<sup>1</sup> And when a manufacturer adopts and applies to his product a new name consisting of words in common use, not generic in character nor descriptive of the article or of its quality, but merely fanciful and arbitrary as applied to such article, he is entitled to protection by injunction in the use of such name, even though it has become so generally known as to be adopted by the public as the name of the article in question.<sup>2</sup> So the use of the word "Pride" upon boxes of cigars manufactured and sold by plaintiffs constitutes a trade mark and entitles them to restrain defendants from using the same word to designate their cigars.<sup>3</sup> And the word "Hoosier," as applied to designate a grain drill manufactured and sold by plaintiff, may become a trade mark, and its unauthorized use by another to designate similar articles manufactured by him may be enjoined.<sup>4</sup>

§ 1072. One who has adopted a word from a foreign language to designate his article of manufacture, and who has spent much time and money in building up a business in the sale of the article by that name, acquires such a property in the word as to entitle him to enjoin its use by defendant in his manufacture, even though defendant uses it in connection with other words, when such use by defendant is calculated to deceive the public.<sup>5</sup> So the use of the word "original" as applied to an article of trade by the original inventor, under which name it has been long used and known in the market, will entitle one whose title is de-

<sup>1</sup> *Roberts v. Clark*, U. S. Circuit Court, Northern District of Illinois, 11 Chicago Legal News, 140.

<sup>2</sup> *Selchow v. Baker*, 93 N. Y., 59.

<sup>3</sup> *Hier v. Abrahams*, 82 N. Y., 519.

<sup>4</sup> *Julian v. Hoosier D. Co.*, 78 Ind., 408.

<sup>5</sup> *Rillet v. Carlier*, 61 Barb., 435.

rived under such inventor to the aid of an injunction to restrain other persons from applying that designation to their manufacture.<sup>1</sup> And when plaintiffs' article has long been manufactured under a particular name as the original invention of the kind, defendant who afterward manufactures the same article will not be permitted to advertise his own as the only genuine article of that kind, and will not be allowed to represent that plaintiffs' article is spurious.<sup>2</sup>

§ 1073. When plaintiffs and their predecessors in title have invented and patented a new article of manufacture, and have given to it a particular name descriptive of that particular subject-matter, and have during the continuance of their patent alone made and sold the substance under that name, they will not, after the expiration of the patent, be protected by injunction restraining another person from manufacturing the same article under the same name, there being no deceit or misrepresentation on the part of defendant as to the identity of the articles.<sup>3</sup> And where defendants' label which it is sought to enjoin is not calculated to deceive or to mislead the public, and is only a description of an article manufactured by defendants according to an expired patent, they will not be enjoined; since a patentee under an expired patent will not be permitted to prolong his monopoly by endeavoring to convert a description of the manufactured article into a trade mark.<sup>4</sup> So when a patented machine becomes known to the public by the use of the patentee's name, his successors do not acquire a property right in the use of such name after the expiration of the patents, and can not enjoin other dealers from using the name in connection with their machines.<sup>5</sup>

§ 1074. A trade mark can not exist in such descriptive words as "cough remedy," as applied to a medical com-

<sup>1</sup> *Cocks v. Chandler*, L. R. 11 Eq., D., 894. See also *Filley v. Child*, 446. 16 Blatch., 376.

<sup>2</sup> *James v. James*, L. R. 13 Eq., 421. <sup>4</sup> *Cheavin v. Walker*, 5 Ch. D., 850.

<sup>3</sup> *Linoleum Co. v. Nairn*, 7 Ch. <sup>5</sup> *Brill v. Singer M. Co.*, 41 Ohio St., 127.

pound sold as a remedy for coughs. And when, in such a case, there is nothing in the general appearance, or in the contents, form, marks or arrangement of words used by defendants upon their labels which would lead any person using reasonable care and observation to believe that defendants' remedy was manufactured by plaintiffs, or is the same as sold by plaintiffs, an injunction will be denied.<sup>1</sup> So the use of a name indicative of the materials of which a commodity is composed, as the words "Rock & Rye" applied to a compound of rock candy and rye whiskey will not be protected by injunction.<sup>2</sup>

§ 1075. The use of plaintiffs' name in connection with a medical preparation manufactured by them being established, they are entitled to an injunction to restrain the use of their name by defendant in connection with his preparation.<sup>3</sup> So where plaintiffs and defendants were manufacturers of blacking, and defendant sold his blacking in bottles which not only resembled those of plaintiffs, but were labeled in a similar manner, the only difference being that plaintiffs' label described their blacking as "manufactured by Day & Martin," and defendant's label described his as "equal to Day & Martin's," the words "equal to" being printed in very small type, an injunction was granted *ex parte* to restrain defendant from using any labels in imitation of plaintiffs'.<sup>4</sup>

§ 1076. A trade mark being usually something indicative of origin or ownership by adoption or repute, and something distinct from the article itself which the mark or name designates, there can be no trade mark in the exterior form or color of the article, and hence no injunction to protect plaintiff in the manufacture of an article of a particular form or color.<sup>5</sup> So a package or barrel can not, by reason

<sup>1</sup> *Gilman v. Hunnewell*, 122 Mass., 139. And see this case for an extended collection of authorities upon the subject of trade marks.

<sup>2</sup> *Van Beil v. Prescott*, 82 N. Y., 630.

<sup>3</sup> *Frese v. Bachof*, 13 Blatch., 234.

<sup>4</sup> *Day v. Binning*, C. P. Cooper, 489.

<sup>5</sup> *Fairbanks v. Jacobus*, 14 Blatch., 337.

of its peculiar form, dimensions or shape, independent of any symbol, figure or device impressed upon or connected with it, constitute a trade mark, and will not be protected by injunction.<sup>1</sup> Nor can the use of a tin pail with certain ornamental designs, in which are contained articles of merchandise for sale, be recognized as a trade mark so as to entitle plaintiff to an interlocutory injunction.<sup>2</sup> And where plaintiffs do not show any special right in respect to the form, size or color of the packages in which their preparation is put up for sale, the labels upon the two articles being sufficient to distinguish the one from the other, even to a careless observer, an interlocutory injunction will be refused as to such matters.<sup>3</sup> Where, however, taking the form of plaintiff's packages, the color of the wrappers and papers done up with them and the form and color of the labels, all considered together, defendant using them for the purpose of passing off his wares as those of plaintiff, a proper case is presented for relief by injunction.<sup>4</sup> Thus, the use by defendants in the sale of medicines of a bottle having the same form as those used by plaintiffs, with the same words stamped or blown in the glass, may be enjoined.<sup>5</sup> So the use of packets or wrappers, in putting up defendant's goods for market, which are so similar to plaintiff's as to induce purchasers to believe that in buying defendant's goods they are buying those of plaintiff, affords sufficient ground for relief by injunction.<sup>6</sup> And in such case proof of a single sale by defendant of the simulated article will warrant the relief.<sup>7</sup> So defendant may be enjoined from

<sup>1</sup> *Moorman v. Hoge*, 14 Int. Rev. Record, 155, U. S. Circuit Court, District of California, October Term, 1871; *S. C.*, 2 *Sawyer*, 78.

<sup>2</sup> *Harrington v. Libby*, 14 *Blatch*, 128.

<sup>3</sup> *Frese v. Bachof*, 13 *Blatch*, 234.

<sup>4</sup> *Frese v. Bachof*, 14 *Blatch*, 432; *Sawyer v. Horn*, 4 *Hughes*, 239; *S. C.*, 1 *Fed. Rep.*, 24; *Sawyer v. Kellogg*, 7 *Fed. Rep.*, 720; *Parlett v.*

*Guggenheimer*, 67 *Md.*, 542; *Alexander v. Morse*, 14 *R. I.*, 153; *Lever v. Goodwin*, 36 *Ch. D.*, 1; *Low v. Hart*, 90 *N. Y.*, 457. See also *Keller v. Goodrich Co.*, 117 *Ind.*, 556; *Smail v. Sanders*, 118 *Ind.*, 105.

<sup>5</sup> *Alexander v. Morse*, 14 *R. I.*, 153.

<sup>6</sup> *Lever v. Goodwin*, 36 *Ch. D.*, 1; *Low v. Hart*, 90 *N. Y.*, 457.

<sup>7</sup> *Low v. Hart*, 90 *N. Y.*, 457.

using a ticket or label in connection with his goods which is so similar to that used by plaintiff and in which he has established his right to a trade mark as to deceive purchasers.<sup>1</sup>

§ 1077. The adoption of a particular brand, the effect of which would be to mislead the public by inducing them to buy the goods as those of another person, will not be permitted.<sup>2</sup> And the making up of goods in a form resembling complainant's, or the use of similar wrappers or labels, whether the similarity consists in size, color, shape, or general appearance, will generally be considered strong presumptive evidence of piracy.<sup>3</sup> So the running of an omnibus, having names and devices similar to those of complainants, and sufficiently like them to deceive the public and draw away complainants' business, will be restrained.<sup>4</sup> So,

<sup>1</sup> *Orr Ewing v. Johnston*, 13 Ch. D., 434, affirmed on appeal to the House of Lords, 7 App. Cas., 219.

<sup>2</sup> *Seixo v. Provezende*, 1 L. R. Ch., 192; *Godillot v. Harris*, 81 N. Y., 263.

<sup>3</sup> *Croft v. Day*, 7 Beav., 84; *Holloway v. Holloway*, 13 Beav., 209; *Blofield v. Payne*, 4 B. & A., 410; *Frese v. Bachof*, 14 Blatch., 432; *Parlett v. Guggenheimer*, 67 Md., 542. See also *Keller v. Goodrich Co.*, 117 Ind., 556; *Smail v. Sanders*, 118 Ind., 105.

<sup>4</sup> *Knott v. Morgan*, 2 Keen, 213. This was a bill filed by the proprietors of the London Conveyance Company, stating that the company was established under a deed, which was set forth in the bill, for the purpose of running omnibuses between certain points; that their omnibuses were of a novel and superior construction; and that the defendant, with the view and design of fraudulently procuring the custom of persons who were in the

habit of using the omnibuses of the plaintiffs, began to run between the same points an omnibus on which were painted the words "Conveyance Company," and "London Conveyance Company," in such characters and parts of the omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs; that a star and garter were, in like manner, painted on the omnibus of the defendant, so as exactly to resemble the same symbol on the omnibuses of the plaintiffs; and that the green livery and gold hat bands, by which the plaintiffs distinguished the coachmen and conductors of their omnibuses, were in like manner imitated by the defendant. The bill further stated that the plaintiffs served a notice upon the defendant, intimating that an injunction would be applied for if the defendant continued to use the title and insignia by which the omnibuses of the plaintiffs were distinguished; and

too, the name of a hotel is a trade mark which equity will protect by injunction.<sup>1</sup> But a word from a foreign language, signifying that the article is warranted, being unintelligible to purchasers, would seem not to come within the rule.<sup>2</sup>

§ 1078. The general principles upon which is founded the jurisdiction of equity over the piracy of trade marks are likewise extended to literary publications, and an author or publisher acquires a right of property in the title of his work, or in the use of his name in connection therewith, for the violation of which he may properly apply to a court of equity for relief.<sup>3</sup> Thus, the publication of a

that, after such notice, the defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus, over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company," the word "for" in very small and invisible characters, so that there were then painted on the back of the defendant's omnibus the words "London Conveyance," and on each side the words "Original Conveyance for Company." The bill stated that the coachmen and conductors employed by the defendant continued to wear the same livery, and it charged that such colorable imitation of the name and title of the London Conveyance Company was a fraud upon the plaintiffs and the public, and it prayed an injunction. Lord Langdale, Master of the Rolls, after disposing of a preliminary question, held as follows: "The only other question is, whether the defendant fraudulently imitated the title and insignia used by the plaintiffs for the purpose of injuring them in their trade; and, upon the affidavits and

evidence before me, I have not the least doubt that the defendant did intend to induce the public to believe that the omnibus which he painted and appointed, so as to resemble the carriages of the plaintiffs, was, in fact, an omnibus belonging to the plaintiffs and the other proprietors of the London Conveyance Company. It is not to be said that the plaintiffs have any exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representations that carriages, really the defendant's, belong to, and are under the management of the plaintiffs."

<sup>1</sup> *Woodward v. Lazar*, 21 Cal., 448.

<sup>2</sup> *Gout v. Aleploglu*, 6 Beav., 69, note.

<sup>3</sup> *Bell v. Locke*, 8 Paige, 75; *Hogg*

magazine in the name of one who has ceased to authorize it will be enjoined. A distinction, however, is taken between representing the work as original, although under the same title, and advertising it as that of another author.<sup>1</sup> And while the relief will be granted to restrain defendant from using the name of complainant's newspaper, yet it must clearly appear that the name is used in such manner as to deceive and mislead the public, and to injure complainant in the good-will of his own publication.<sup>2</sup> Thus, an injunction has been refused in behalf of the proprietor of an old established newspaper called "The Mail," to restrain defendant from publishing a paper under the name of "The Morning Mail."<sup>3</sup> But where plaintiffs had long been the publishers of a paper under the name of "The National Police Gazette," by which name it was widely and generally known and circulated throughout the country, defendants were enjoined from publishing or selling a paper under the name of "The United States Police Gazette," the words "Police Gazette" in defendants' paper being printed in similar type to the same words in plaintiffs' paper, and a similar imitation characterizing the general form, style, type and device of defendants' paper, thereby misleading purchasers into the belief that they were purchasing plaintiffs' paper.<sup>4</sup>

§ 1079. It is also to be remarked that an injunction is proper only in such cases as are clear, or at least free from all reasonable doubt. Thus, where defendant has sold his newspaper, with all the profits, rights and incidents pertaining to it, and afterward, and at the same place, begins another under a name somewhat similar, a doubt as to the identity of the two papers is sufficient ground for withholding the relief.<sup>5</sup> And the publication must have an actual

*v. Kirby*, 8 Ves., 215; *Chappell v. Sheard*, 2 Kay & J., 117.

<sup>4</sup> *Matsell v. Flanagan*, 2 Ab. Pr. N. S., 459.

<sup>1</sup> *Hogg v. Kirby*, 8 Ves., 215.

<sup>5</sup> *Snowden v. Noah*, Hopk. Ch., 347.

<sup>2</sup> *Bell v. Locke*, 8 Paige, 75.

<sup>3</sup> *Walter v. Emmott*, 54 L. J. R. N. S. Ch., 1059.



existence before equity will interfere, and one who has advertised his intention of publishing a periodical under a certain name does not thereby acquire such an exclusive right to that name, in advance of publication, as will entitle him to an injunction.<sup>1</sup> But where a song has been rendered popular by being sung by a particular person, its publication with a picture of the singer upon the title page, with a statement where and by whom it has been sung, gives the owner such rights of property therein as will authorize the interference of equity to restrain a similar publication in imitation thereof, even though the words of the song are changed.<sup>2</sup> Nor will it avail the defendant that he has warned his servants or employees to explain to purchasers that the songs are different.<sup>3</sup>

§ 1080. The sale of one's interest in a co-partnership carries with it the good-will of the business, together with all advantages that may pertain to the firm name or place of business. Hence a retiring partner will not be allowed to renew the business under such a name as to imply that he is the successor to the old firm.<sup>4</sup> Upon the formation of a partnership, a trade mark belonging to one of the partners, in the absence of any agreement to the contrary, becomes partnership property,<sup>5</sup> and on the dissolution of the firm, in the absence of any stipulation or agreement, each of the partners has the right to use the mark.<sup>6</sup> The use, by new partners or their successors, of the old trade mark of a firm, is not considered a piracy, since it is merely equivalent to an announcement that the new partners are continuing the business formerly carried on by those whose name constituted the trade mark.<sup>7</sup> But when a firm of mercantile

<sup>1</sup> *Maxwell v. Hogg*, 2 L. R. Ch. Ap., 307.

<sup>2</sup> *Chappell v. Sheard*, 2 Kay & J., 117.

<sup>3</sup> *Chappell v. Davidson*, 2 Kay & J., 123; S. C. on appeal, 8 DeGex, M. & G., 1; *Morgan v. Schuyler*, 79 N. Y., 490.

<sup>4</sup> *Churton v. Douglas*, 5 Jur. N. S., 887; S. C., John., 174.

<sup>5</sup> *Bury v. Bedford*, 33 L. J. Ch., 465.

<sup>6</sup> *Banks v. Gibson*, 34 Beav., 566.

<sup>7</sup> *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L., 523.

partners dissolves and each resumes business for himself, one of such partners may be enjoined from using the former firm name upon his sign in such manner as to indicate the continuance of the firm. And the test in such cases is, that the sign or mark must be false in fact, and be so known to the person using it, and must be used with the intention of deceiving and be of such a character as to mislead a person of ordinary caution. But the injunction may be granted upon no other proof of an intention to deceive than arises from the fact of such false representation and of its necessary tendency to deceive.<sup>1</sup> And a trade mark which is indicative of origin or ownership in the original proprietor of the article, as "Twin Brothers" applied to yeast manufactured by brothers who are twins, may be sold by one of the proprietors as an appurtenance to the business which he sells; and in such case the purchaser may enjoin one of the twin brothers from using the trade mark in the same business.<sup>2</sup> So a merchant, having carried on business under the name of "Little Jake" as a trade mark, and having sold the business and the right to use such name, covenanting not to engage in the same business in that city, nor to authorize any other person to use such words, may be enjoined from violating the covenant. And the associates of defendant in establishing the rival business, in such case, may also be enjoined.<sup>3</sup> So partners who have sold their interest in the business and good-will of a firm may be enjoined from conducting a rival business in the vicinity, under a name so similar to that of the old firm as to mislead customers, the relief being granted in such case against all persons engaged in the new enterprise.<sup>4</sup>

<sup>1</sup> *Peterson v. Humphrey*, 4 Ab. Pr., 394. And see, as to the use by a continuing partner of the old firm name as a trade mark after a dissolution and the retiring of one member from the firm, and the right to an injunction in such case, *Hallett v. Cumston*, 110 Mass., 29.

<sup>2</sup> *Burton v. Stratton*, 12 Fed. Rep., 696. See also *Kidd v. Johnson*, 100 U. S., 617.

<sup>3</sup> *Grow v. Seligman*, 47 Mich., 607.

<sup>4</sup> *Myers v. Kalamazoo B. Co.*, 54 Mich., 215.

§ 1081. A corporate name is regarded as a trade mark and as such it is entitled to the protection of a court of equity. And the right to the use of such name being matter of record, equity will not refuse to enjoin its improper use by a defendant corporation because the right has not been established at law. Nor does the jurisdiction to restrain the piratical use of such name rest upon the insolvency of the defendant. But the corporation whose name is improperly used must itself be a party to the suit, and the proceedings can not be brought by one of its bondholders, unless it has refused to proceed after being requested so to do.<sup>1</sup> And an injunction has been granted to restrain a proposed new corporation from applying for registration under a corporate name so similar to that of a corporation already existing as to be liable to mislead persons into the belief that it was the same.<sup>2</sup> But a foreign corporation, not incorporated in the state in question and only entitled to transact business there as a matter of comity, can not maintain a bill in a federal court sitting in that state to restrain defendants from incorporating under the laws of that state under the same name as that of plaintiff.<sup>3</sup>

§ 1082. The protection extended by courts of equity to trade marks is not confined to artificial commodities, or to such as are the result of human ingenuity and skill. The essence of the injury consisting in the fraudulent sale by defendant of the goods or commodities of complainant as his own, the violation of right is the same, whether the commodity in question has been produced by the hand of nature or of man. And where the owner of a natural product, such as mineral water, has applied to it a particular name, under which name he has built up a large and profitable business in the sale of the article, he is entitled to an injunction to protect him in the exclusive use of the name.<sup>4</sup>

<sup>1</sup> *Newby v. Oregon Company*, 1 Dedy, 609.

<sup>2</sup> *Hendriks v. Montagu*, 50 L. J. R. N. S. Ch., 456.

<sup>3</sup> *Lehigh V. C. Co. v. Hamblen*, 23 Fed. Rep., 225.

<sup>4</sup> *Congress Co. v. High Rock Co.*, 45 N. Y., 291; S. C., 10 Ab. Pr. N.

And complainants who have purchased the spring and the interest of the original owners, who invented and adopted the trade mark, are entitled to the same protection as the original owners themselves.<sup>1</sup> And where one has adopted and applied a particular name, as "Bethesda" or "Clysmic," to the waters of his spring, under which they have become widely known as a valuable commodity and article of commerce, and have acquired a high reputation as a remedial agent in certain diseases, the owner of a spring upon adjacent premises may be restrained from using the same word to distinguish the waters of his spring.<sup>2</sup> So the use of the

S., 348, reversing S. C., 57 Barb., 526; *Dunbar v. Glenn*, 42 Wis., 118.

<sup>1</sup> *Congress Co. v. High Rock Co.*, *supra*.

<sup>2</sup> *Dunbar v. Glenn*, 42 Wis., 118; *Hill v. Lockwood*, 62 Wis., 507. And see *Wheeler v. Johnston*, 3 L. R. Ir., 284. The opinion of the court in *Dunbar v. Glenn*, 42 Wis., 118, as delivered by Mr. Justice Cole, very clearly states the principles applicable to cases of this nature. He says, p. 137: "The learned counsel for the defendants insisted that the word 'Bethesda,' as used by the plaintiff, denotes the kind, character, quality or utility of the waters of her spring, and therefore could not be a lawful trade mark. But we do not understand that the plaintiff uses or applies the word in any such sense or for any such purpose. It will avail little to resort to the original meaning of the word 'Bethesda' as defined by biblical writers. It is sufficient to say that the word, as used by the plaintiff, does not describe any quality of the water. It seems to have been adopted to indicate origin or ownership and to have a name by which the water could be distinguished when bought and

sold in the market. The plaintiff has a right to the exclusive use of the word, when employed as a trade mark for such a purpose. The cases cited on the brief of defendants' counsel clearly recognize such a right. Where the trade mark, in its original signification or by association, distinctively points to the origin or ownership of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade mark. *Canal Co. v. Clark*, 13 Wal., 311; *Brooklyn White Lead Co. v. Masury*, 25 Barb., 416; *Wolfe v. Goulard*, 18 How. Pr., 64; *Burke v. Cassin*, 45 Cal., 468; *Stokes v. Landgraff*, 17 Barb., 608; *Corwin v. Daly*, 7 Bosw., 222; *Caswell v. Davis*, 58 N. Y., 223; *Choynski v. Cohen*, 39 Cal., 501; *Perry v. Truefitt*, 6 Beav., 66. But this case does not fall within any of the exceptions stated to the rule in the above cases. Here the plaintiff adopted and applied the name 'Bethesda' to her spring to mark or distinguish the waters thereof in the market; and she has the right to its exclusive use. It is not intended to, nor does it, indicate the quality or con-

word "Appollinis" by defendants on their labels and bottles for the sale of a particular water, in connection with the representation of a bow and arrow or anchor, has been enjoined because of its resemblance to the word "Appolinaris" and the representation of an anchor as used by plaintiff on his bottles.<sup>1</sup>

§ 1083. While one who has been in the actual employ of a firm of established reputation in a particular business may, on beginning business of a similar character on his own account, inform the public that he has been in such employment, yet if he uses the name of the former firm in such manner as to mislead persons into the belief that he is carrying on the same business, or a branch of the business of the old firm, an injunction will be allowed.<sup>2</sup> But in such case the court may, before granting the relief, require satisfactory proof, not only that defendant's use of the name is likely to mislead the public, but that complainant has warned him that it will have that effect.<sup>3</sup> And where defendant is in the employ of plaintiff, who is the proprietor of certain medicines, and surreptitiously obtains possession of plaintiff's recipes and copies them, and after leaving plaintiff's employ uses them in making the medicines and selling them with printed directions similar to plaintiff's, an injunction may be allowed on the ground of breach of trust.<sup>4</sup>

§ 1084. As in the case of infringement of patents or copyrights, one whose trade mark has been pirated is entitled to an account of the profits accruing to defendant by

"stituents of the water, but rather its origin or ownership; and is designed as a name for distinguishing the water, by which it may be bought and sold. It follows from these views that the order of the circuit court dissolving the injunction must be reversed, and the cause remanded for further proceedings according to law."

<sup>1</sup> *Brunnen v. Somborn*, 14 Blatch., 380.

<sup>2</sup> *Glenny v. Smith*, 2 Dr. & Sm., 476; *Williams v. Osborne*, 13 L. T. N. S., 498. And see *Croft v. Day*, 7 Beav., 84.

<sup>3</sup> *Williams v. Osborne*, 13 L. T. N. S., 498.

<sup>4</sup> *Yovatt v. Winyard*, 1 Jac. & W., 394.

reason of his wrongful appropriation of the trade mark.<sup>1</sup> But where one has, in good faith, purchased articles bearing a spurious mark, for the purpose of again selling them in the course of trade, he will only be required to account for such profits as may have accrued after notice of the piracy.<sup>2</sup> And although an injunction may be granted, even where the *scienter* is not proved, the court may withhold an account of profits, where the owner of the trade mark has been guilty of laches in seeking protection against the piracy.<sup>3</sup>

<sup>1</sup> Burgess v. Hills, 26 Beav., 244;      <sup>3</sup> Harrison v. Taylor, 11 Jur. N. Cartier v. Carlile, 31 Beav., 292.      S., 408.

<sup>2</sup> Moet v. Couston, 33 Beav., 578.

## II. PRINCIPLES GOVERNING THE RELIEF.

- § 1085. The general doctrine stated.
- 1086. Deception must be shown.
- 1087. Fraudulent intent not necessary; partial piracy.
- 1088. Resemblance must deceive ordinary purchasers.
- 1089. The same.
- 1090. Colorable imitation; when name *publici juris*.
- 1091. Representations as to quality; prospectus of company.
- 1092. Plaintiff's deceit and misrepresentation.
- 1093. Slander of name or business.
- 1094. Fraud on part of plaintiff.
- 1095. Labels.
- 1096. Sale of genuine and original article not enjoined.
- 1097. Injunction refused in cases of doubt.
- 1098. Promise to refrain no bar to injunction.
- 1099. Name of periodical protected.
- 1100. Diligence necessary.
- 1101. Limitations upon the doctrine.

§ 1085. The fundamental principle governing the jurisdiction of equity in restraint of the infringement of trade marks is, that when one produces an article of merchandise, calling it by a particular name and selling it with a particular mark, he thereby acquires such an exclusive right to the use of that name or mark as entitles him to restrain all others from its use to designate articles of a similar appearance or kind. And if another person uses such name or mark, for the purpose of selling goods of an inferior quality, although of similar external appearance, whereby purchasers may be misled into the belief that they are buying the goods of the original maker, the injury done to him is sufficient ground for relief by injunction.<sup>1</sup> To warrant the exercise of equitable jurisdiction, in these cases, there must be, first, the existence of a trade mark; second, the fact of an imitation, either directly or with such variations as are merely colorable; and third, the fact that such imitation is made without the license, or acquiescence of the

<sup>1</sup> *Hirst v. Denham*, L. R. 14 Eq., 542.

owner.<sup>1</sup> And courts of equity in granting relief by injunction in this class of cases proceed upon the principle that it is a fraud upon one who has established a trade and carried it on under a given name to permit another to assume that name, or the same name with a slight alteration, in such manner as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to that name. Where, therefore, plaintiffs have long been engaged in a given locality, under a particular name, and defendant embarks in the same business under substantially the same name, with the intention of deceiving purchasers by inducing them to believe that it is plaintiffs' business, and he does so deceive them, a proper case is presented for relief by injunction. But in such case it is proper to confine the injunction to the use of the name in a particular place, since the tendency to mislead is largely dependent upon the place where the name is used.<sup>2</sup>

§ 1086. It seems to follow necessarily from the principles already stated that, since false representation is a principal ground for relief in equity by injunction against the piracy of a trade mark, when no false representation or deceit is used, defendant only endeavoring, by his advertisement and by selling the article complained of, to show to the public that the article is that of his own manufacture, equity will not interfere in the absence of any evidence of persons having been misled or deceived in the matter, even though defendant may also use as designating his article the name of the original manufacturer of the article sold by plaintiff.<sup>3</sup> And when upon the case presented there is no evidence of fraud or of deceitful representation, the court will decline to interfere.<sup>4</sup> Nor will the court enjoin

<sup>1</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75.

<sup>2</sup> *Lee v. Haley*, L. R. 5 Ch., 155. And see this case as to the effect of plaintiff defrauding the public by short weight as a bar to relief in equity.

<sup>3</sup> *Singer M. Co. v. Loog*, 18 Ch. D., 395. But see *Singer Machine Manufacturers v. Wilson*, 3 App. Cas., 376, reversing S. C., 2 Ch. D., 434.

<sup>4</sup> *Cheavin v. Walker*, 5 Ch. D., 850.



unless it is satisfied that deception will result from the use by defendants of the device or mark which it is sought to enjoin as a piracy, or that there is a probability of such deception, or unless the act of defendant is calculated to deceive. And the burden of proof in such cases rests upon plaintiff, and in the absence of proof of such deception the injunction will be refused.<sup>1</sup> So, too, when there is no intention upon the part of defendants to appropriate, and no probability of their appropriating plaintiff's business, and the similarity in the names used is not such as to necessarily lead to the inference of any intention to deceive, and when there is no proof of actual deception by the use of the name adopted by defendants, although it somewhat resembles that of plaintiff, the relief will be refused.<sup>2</sup> And when the points of difference between the two articles are so marked and striking as to at once produce an impression upon inspection that they are different productions, an action for an injunction can not be maintained, since the court will not interfere when the resemblance is not such as will result in deception.<sup>3</sup>

§ 1087. While actual deception or a tendency to deceive in the use by defendants of the trade mark in question is, as is thus seen, essential to lay the foundation for equitable relief, it is not to be inferred that an actual fraudulent intent need be proven to warrant the exercise of the jurisdiction.<sup>4</sup> Indeed, it may be laid down as a general rule, that to constitute piracy of a trade mark no fraudulent intent is necessary, and the injunction may be granted, even though defendant was ignorant that the devices or symbols

<sup>1</sup> *Cope v. Evans*, L. R. 18 Eq., 138. See also *Desmond's Appeal*, 103 Pa. St., 126; *Civil Service Supply Association v. Dean*, 13 Ch. D., 512.

<sup>2</sup> *Merchant Banking Company v. Merchants Joint Stock Bank*, 9 Ch. D., 560.

<sup>3</sup> *Tallcott v. Moore*, 1 N. Y.

*Weekly Dig.*, 485; *Manufacturing Co. v. Trainer*, 101 U. S., 51.

<sup>4</sup> *Clement v. Maddick*, 1 Giff., 98; *Hier v. Abrahams*, 82 N. Y., 519; *Pratt's Appeal*, 117 Pa. St., 401. See also *Singer Machine Manufacturers v. Wilson*, 3 App. Cas., 376, reversing S. C., 2 Ch. D., 434.

used were the property of another.<sup>1</sup> And if the acts complained of have a tendency to mislead the public, a denial of fraudulent intent will not prevent equity from granting the relief.<sup>2</sup> Nor is it necessary in cases of this character to prove actual fraud upon the part of defendant, or that the credit of plaintiff is injured by the sale of an inferior article, the injury to plaintiff's trade by loss of custom being sufficient ground for relief. And the injunction may be granted, even though the persons buying of defendant the goods bearing plaintiff's mark were aware that they were not the goods of plaintiff's manufacture; nor is it necessary to prove that persons have actually been deceived in buying defendant's goods under the belief that they were plaintiff's, provided the resemblance is such as to cause the one to be mistaken for the other.<sup>3</sup> And the relief may be granted, although the whole of the trade mark does not appear to have been pirated.<sup>4</sup>

§ 1088. In applications for relief by injunction against the piracy of trade marks, the question to be considered is, not whether manufacturers or persons skilled in that particular business could distinguish between the two articles, but whether the general public would be likely to be deceived by the alleged imitation.<sup>5</sup> Nor is it requisite that the degree of resemblance should be such as to deceive persons on seeing the marks side by side, but it must be such that ordinary purchasers, proceeding with ordinary care, would be likely to be deceived.<sup>6</sup> And where the court is

<sup>1</sup> *Millington v. Fox*, 3 Myl. & Cr., 338; *Rodgers v. Nowill*, 6 Hare, 325; *Coffeen v. Brunton*, 4 McLean, 516; *Davis v. Kendall*, 2 R. I., 566.

<sup>2</sup> *Edelsten v. Vick*, 11 Hare, 84.

<sup>3</sup> *Edelsten v. Edelsten*, 1 DeGex, J. & S., 185; *Braham v. Bustard*, 11 W. R., 1061. In *Edelsten v. Edelsten*, plaintiff, a manufacturer of wire marked with an anchor, and which had become known as "Anchor Brand Wire," was al-

lowed an injunction against an infringement consisting in the marking by defendant of his wire with the device of a crown and anchor.

<sup>4</sup> *Braham v. Bustard*, 11 W. R., 1061.

<sup>5</sup> *Shrimpton v. Laight*, 18 Beav., 164.

<sup>6</sup> *Seixo v. Provezende*, L. R. 1 Ch., 192; *McLean v. Fleming*, 6 Otto, 245; *Glen Cove M. Co. v. Ludeling*, 22 Fed. Rep., 823.

of opinion that the use of defendant's name or device on a literary publication is not such as to mislead persons of ordinary intelligence into purchasing defendant's publication for that of complainant, an injunction will be withheld.<sup>1</sup> Nor will the use of a particular label be restrained upon the ground of its general resemblance to the trade mark of another manufacturer, where defendant's label differs in those points which a purchaser would be most likely to examine to ascertain whose article he was purchasing.<sup>2</sup> Even though defendant's trade mark which it is sought to enjoin as an infringement does in some respect resemble plaintiff's, yet if the resemblance is not such as to deceive ordinary purchasers or persons of ordinary intelligence, a court of equity will decline to interfere.<sup>3</sup> So when the differences between the two devices are so palpable that a person of ordinary care and diligence would not be deceived, equity will not enjoin.<sup>4</sup>

§ 1089. While courts of equity may properly interfere by injunction to prevent one person from imposing upon or deceiving the customers of another by means of simulated labels, *indicia* or advertisements, yet to warrant the relief the devices adopted to the prejudice of the earlier business must be such as would ordinarily lead persons dealing in the article in question to suppose defendant's article to be that of plaintiff. In other words, the resemblance or simulation must be one from which deception and imposition may result, and when this does not appear an injunction will not lie. When, therefore, plaintiff seeks to enjoin de-

<sup>1</sup> *Bradbury v. Beeton*, 39 L. J. Ch. N. S., 57. In this case plaintiffs, who were the proprietors of a long established weekly comic periodical called "Punch," were refused an injunction against the publication by defendants of a rival publication of a similar character called "Punch and Judy," defendants' publication bearing a different illustration upon the

cover, and being sold at a different price.

<sup>2</sup> *Blackwell v. Crabb*, 36 L. J. Ch., 504.

<sup>3</sup> *Blackwell v. Wright*, 73 N. C., 310.

<sup>4</sup> *Leather Cloth Co. v. American Cloth Co.*, 11 H. L., 523; opinion of Wright, J., in *Partridge v. Menck*, How. Ap. Cas., 547, affirming S. C., 2 Barb. Ch., 101.

fendant from circulating a printed book descriptive of medicines manufactured and sold by him, but the differences between the two books are so great as to at once produce the impression that both the books and the medicines are different, an injunction will be denied.<sup>1</sup> But, while it is often a matter of great difficulty to determine what degree of resemblance will constitute a piracy, it is to be observed that the test is not whether a wary and cautious person would be likely to be misled by the imitation, but whether it is such as would deceive the unwary and careless.<sup>2</sup> And it should, at least, appear that the resemblance is such as to raise the probability of mistake on the part of the public, or of a design and purpose on the part of the defendant to deceive the public.<sup>3</sup>

§ 1090. Equity does not, however, require an exact similarity in the name or device used by defendant as a condition of its interference by injunction against an infringement of plaintiff's trade mark, and a colorable imitation in the device which requires a careful inspection to distinguish it from the original is sufficient ground for invoking the aid of equity, the relief being granted when the similarity is such as to mislead and deceive an ordinary purchaser in the exercise of ordinary care and caution.<sup>4</sup> And where plaintiff has for many years been engaged in the manufacture and sale of pills, under a particular name and device, and defendant sells pills under a name *idem sonans*, contained in boxes of the same form as plaintiff's, and with wrappers of the same general appearance, the resemblance between defendant's packages and those of plaintiff being such as to mislead an ordinary purchaser, an injunction will be allowed.<sup>5</sup> And while it is true that a word used as a trade mark, and entitled to protection as such, may

<sup>1</sup> Tallcot v. Moore, 6 Hun, 106.

<sup>2</sup> Seixo v. Provezende, L. R. 1 Ch., 192; Williams v. Spence, 25 How. Pr., 366.

<sup>3</sup> McCartney v. Garnhart, 45 Mo.,

593. And see Filley v. Fassett, 44 Mo., 168.

<sup>4</sup> McLean v. Fleming, 6 Otto, 245; Godillot v. Harris, 81 N. Y., 263.

<sup>5</sup> McLean v. Fleming, 6 Otto, 245.

become *publici juris* by general use, so as to disentitle plaintiff to relief in equity, yet the test in determining whether it has become thus public is, whether its use by persons other than the original owner is calculated to deceive the public.<sup>1</sup>

§ 1091. It is not every false statement with respect to articles sold which constitutes such a grievance as to warrant the interference of a court of equity, and a distinction is to be drawn between representations that the goods are the same as those of another, and statements that they are in fact the identical goods of another person, when in reality they are not. While, therefore, the person selling may represent his goods to be equal to or the same as those of another dealer, when they are inferior in quality, or different in kind, or that he is the inventor, when, in fact, he is a mere imitator, yet if he does not represent his goods as the actual manufacture of another, equity will not interfere, but will leave the parties to their remedy at law.<sup>2</sup> But the unauthorized publication of one's name in the prospectus of a company as one of its trustees will be restrained.<sup>3</sup>

§ 1092. In cases of interference to restrain the piracy of trade marks a strict application is made of the rule that he who would have equity must do equity. And if complainant's trade mark contains in itself any misstatements tending to deceive the public, either as to the place where his goods are manufactured, or as to the quality and identity of the goods purchased, he is guilty of a fraud as well as defendant, and will not be protected.<sup>4</sup> So where plaintiffs

<sup>1</sup> Ford v. Foster, L. R. 7 Ch., 611. Perry v. Truefitt, 6 Beav., 66;

<sup>2</sup> Leather Cloth Co. v. American Leather Cloth Co. v. American Leather Cloth Co., 11 H. L., 523; Leather Cloth Co., 11 H. L., 523; Clarke v. Freeman, 11 Beav., 112. Wolfe v. Burke, 56 N. Y., 115, reversing S. C., 7 Lans., 151; Siegert

<sup>3</sup> Routh v. Webster, 10 Beav., 563. v. Abbott, 61 Md., 276. See also

<sup>4</sup> Palmer v. Harris, 60 Pa. St., 156; Pidding v. How, 8 Sim., 477; Partridge v. Menck, How. Ap. Cas., 547, affirming S. C., 2 Barb. Flavel v. Harrison, 10 Hare, 467; Ch., 101.

have acquired whatever property they may have in the article claimed as a trade mark by fraudulent and deceitful representations and advertisements as to its origin and quality, they will not be allowed the aid of an injunction.<sup>1</sup> So it is said if a trade mark falsely represents the goods as patented, there being no patent, the owner is guilty of such misrepresentation as will debar him from relief,<sup>2</sup> But if in such case a court of equity is in doubt as to whether a court of law might not consider the party aggrieved entitled to some relief against defendant, for having used his name in connection with the sale of the article, the bill may be retained until an action at law can be brought to determine the right.<sup>3</sup> And the use of the word "patent" as part of a trade mark of goods which have never been patented will not prevent a party from obtaining an injunction against the infringement of his trade mark, if the word has not been used in such manner as to deceive and mislead the public into the belief that the article was actually protected by patent.<sup>4</sup> Thus, the words "patent thread" may be used as part of a trade mark where they have long been employed in the trade as a term of art to designate a particular kind of thread, although it has never been patented.<sup>5</sup> And where the deceit or fraud upon the part of plaintiff, which is relied upon to defeat his application for equitable relief, is not in the trade mark itself but in the collateral matter, as where the trade mark itself is *bona fide*, but in printed circulars issued by plaintiff he represents himself as a patentee of the article, the trade mark itself containing no false representation, plaintiff may still receive protection by injunction.<sup>6</sup> So, too, it would seem that misrepresentations upon

<sup>1</sup>Seabury v. Grosvenor, 14 Blatch., 262.

<sup>2</sup>Leather Cloth Co. v. American Leather Cloth Co., 11 H. L., 523, 543; Flavel v. Harrison, 10 Hare, 467; Cheavin v. Walker, 5 Ch. D., 850; Fairbanks v. Jacobus, 14 Blatch., 337.

<sup>3</sup>Flavel v. Harrison, 10 Hare, 467.

<sup>4</sup>Marshall v. Ross, L. R. 8 Eq., 651.

<sup>5</sup>Marshall v. Ross, L. R. 8 Eq., 651.

<sup>6</sup>Ford v. Foster, L. R. 7 Ch., 611.

the part of plaintiff as to his own manufacture of goods, if made after the commencement of the suit for injunction, constitute no bar to the relief.<sup>1</sup>

§ 1093. To warrant relief by injunction to prevent the infringement of one's trade mark, it is essential that an infringement of some actual property right should be shown. A court of equity will not, therefore, restrain the publication of false statements concerning plaintiff's article upon the ground of protecting his trade mark. Thus, a sewing machine company, which has obtained a premium for the best machine exhibited at a fair, can not enjoin a rival company from publishing that it and not the plaintiff obtained such premium, since this is not an infringement upon any property right, but at the most the statement of a libelous or untruthful matter; and the rule is well established that equity will not enjoin a mere slander or libel, or the utterance of an untruth.<sup>2</sup> And it may be asserted as a general rule that such false representations as amount to the slander of another's reputation and name, and as are calculated to bring them into contempt, do not afford sufficient foundation for the interference of equity, the proper remedy, if any, being by proceedings at law for a libel.<sup>3</sup> So where plaintiff had infringed defendant's trade mark, and upon proceedings being instituted against him therefor a settlement was effected upon his giving a written apology with power to defendants to make such use of it as they saw fit, the court refused to restrain defendants from continuing the publication of such apology.<sup>4</sup>

§ 1094. It is also essential that he who seeks the aid of equity for the protection of his trade mark should in all cases come into court with clean hands. And when the business in which plaintiff is engaged is to a certain extent a fraud upon the public, by deceiving them with reference

<sup>1</sup> *Siebert v. Findlater*, 7 Ch. D., 801.

<sup>2</sup> *Singer Manufacturing Co. v. The Domestic Co.*, 49 Ga., 70.

<sup>3</sup> *Seeley v. Fisher*, 11 Sim., 582; *Clarke v. Freeman*, 11 Beav., 112.

<sup>4</sup> *Fisher v. Appollinaris Co.*, L. R. 10 Ch., 297.

to the nature and qualities of the articles sold by him, as in selling gin under the name of schnapps, and asserting it to be a valuable medicinal compound and a specific for many diseases, such fraudulent representations upon the part of plaintiff will debar him from relief by injunction for the protection of his alleged trade mark.<sup>1</sup>

§ 1095. Preventive relief by injunction is frequently granted for the protection of trade marks consisting in a particular label or brand attached to or designating the article which is manufactured or sold by plaintiff. And in cases of this nature, the mere fact that defendant's label which it is sought to enjoin as a piracy of plaintiff's trade mark indicates the name of the manufacturer is not, in itself, conclusive evidence of good faith on the part of defendant.<sup>2</sup> So defendant may be restrained from using labels which so closely resemble plaintiff's in color and in general appearance as to mislead purchasers into buying defendant's goods under the belief that they are buying those of plaintiff.<sup>3</sup> And when goods of an inferior quality are put in circulation under a brand which is an imitation of that of plaintiff, he is entitled to protection by injunction.<sup>4</sup> Where, however, a merchant dealing in cigars makes a particular label and sends it to the manufacturer to be put upon cigars of a particular kind to be furnished him by the manufacturer, and the latter afterward supplies cigars of the same description and with the same label to his agents, they will not be enjoined from selling cigars of that label, upon an interlocutory application, in the absence of any evidence of a contract by the manufacturer to sell exclusively to plaintiff.<sup>5</sup> So when the fact of infringement is uncertain and the granting of an injunction might result in greater injury to defendants than its refusal would cause to plaintiffs, it is

<sup>1</sup> *Wolfe v. Burke*, 56 N. Y., 115, reversing S. C., 7 Lans., 151.

<sup>2</sup> *Siegert v. Findlater*, 7 Ch. D., 140.

<sup>3</sup> *Royal B. P. Co. v. Davis*, 26 Fed. Rep., 293.

<sup>4</sup> *Upmann v. Elkan*, L. R. 7 Ch., 130, affirming S. C., L. R. 12 Eq.,

<sup>5</sup> *Hirsch v. Jonas*, 3 Ch. D., 584.



proper to refuse an interlocutory injunction.<sup>1</sup> And where plaintiff's trade mark consisted in a label of a particular form and description upon bottles sold by him in his business, and it appeared that in many instances similar labels might be and probably were sold for a legitimate purpose, an injunction was refused, in the absence of proof of actual fraud, until plaintiff should establish his right by an action at law; the ground of refusal being that while an injunction might stop defendant's fraudulent use of the label, it might also prevent its legitimate use.<sup>2</sup> But in such a case, after verdict in an action at law establishing plaintiff's right, the injunction may be granted.<sup>3</sup>

§ 1096. The gist of the offense in the piracy of a trade mark consisting in selling the goods of one manufacturer or vendor as those of another, equity will not interfere by injunction to restrain the sale of the original and genuine article itself. Thus, where one purchases the right to stamp upon watches of his own manufacture the name of a celebrated manufacturer, he can not restrain the sale by defendant of the genuine watches which are actually made by such celebrated manufacturer.<sup>4</sup>

§ 1097. The jurisdiction of equity in cases affecting trade marks has been by some courts treated as being not a distinct or substantive jurisdiction, but rather as one which is to be exercised in aid of courts of law, or in cases where an action at law might be maintained. In accordance with this doctrine, it is held that where the legal right of plaintiff is not clear the injunction will not be granted *in limine*.<sup>5</sup> And when the testimony touching plaintiff's ownership and title is so conflicting that it is difficult to determine upon which side the weight of evidence prepon-

<sup>1</sup> Foster v. Blood Balm Co., 77 Ga., 216.

<sup>2</sup> Farina v. Silverlock, 6 DeGex, M. & G., 214, reversing S. C., 1 Kay & J., 509.

<sup>3</sup> Farina v. Silverlock, 4 Kay & J., 650.

<sup>4</sup> Samuel v. Buger, 13 How. Pr., 342.

<sup>5</sup> Foot v. Lea, 13 Ir. Eq., 484; Marshall v. Pinkham, 52 Wis., 572.

derates, equity should not interpose by injunction.<sup>1</sup> So where the question as to defendant's right to use complainant's trade mark is not entirely free from doubt, the injunction will not be allowed if defendants are able to respond in pecuniary damages at law.<sup>2</sup> So if the question as to whether complainant's trade mark has actually been pirated in such a manner as to injure him and deceive the public is involved in doubt, or if it be doubtful whether complainant has such a legal right as would justify an injunction, the relief should not be allowed until the cause is heard upon pleadings and proof, or until complainant has established his right at law.<sup>3</sup> And, in general, it may be said that equity will not interfere where complainant's right is not clearly established, especially where it appears that both parties were originally concerned in the manufacture of the article as copartners.<sup>4</sup> But, in order to defeat complainant's right to appropriate a particular symbol or term on the ground of its having been previously in common use, it must appear that such use extended to and included complainants.<sup>5</sup>

§ 1098. We have already seen, in discussing the interference of equity to prevent the infringement of patents for inventions, that a patentee, whose rights have been infringed, is not bound to rely on the assurances or promises of the person infringing that he will not repeat the wrong, and that such promises constitute no bar to relief by injunction.<sup>6</sup> The same doctrine prevails in cases of the piracy of trade marks, and the owner of a mark or device which has been illegally taken by another is entitled to an injunc-

<sup>1</sup> *Witthaus v. Braun*, 44 Md., 303.

<sup>2</sup> *Howe v. Howe Machine Co.*, 50 Barb., 236.

<sup>3</sup> *Partridge v. Menck*, 2 Barb. Ch. R., 101, affirming S. C., 2 Sandf. Ch., 622, affirmed How. Ap. Cas., 547; *Spottiswoode v. Clark*, 2 Ph., 154. But in the latter case it

is held that defendant may in the meantime be required to keep an account.

<sup>4</sup> *Coffeen v. Brunton*, 5 McLean, 256.

<sup>5</sup> *Newman v. Alvord*, 49 Barb., 588.

<sup>6</sup> See § 976, *ante*.

tion, notwithstanding defendant's promise to refrain from continuing the piracy.<sup>1</sup>

§ 1099. Equity may properly interfere by injunction for the protection of a name or title applied to a periodical or newspaper.<sup>2</sup> Thus, where plaintiffs were the proprietors of a newspaper known as "Bell's Life," they were allowed an injunction to restrain defendant from publishing a newspaper under the title of "Penny Bell's Life," even though no fraudulent intention was shown, the use of the name adopted by defendant being likely to injure plaintiffs by causing purchasers of defendant's paper to suppose that they were buying that of plaintiff.<sup>3</sup> So where plaintiff was the proprietor of a weekly newspaper called "The Britannia," which he subsequently incorporated with another newspaper called "The John Bull," and thereafter issued the publication under the title of "The John Bull and Britannia," defendant, who had been the printer and publisher of plaintiff's paper under its former title, was enjoined from printing or publishing a paper called the "True Britannia," in imitation and as a continuation of plaintiff's paper.<sup>4</sup> And where a series of juvenile books of uniform appearance have long been published under the name of "Chatterbox," and have become widely known and popular under that name, the purchaser of an exclusive territorial right to the use of such name in connection with the same publications is entitled to protection by injunction in the use of the name.<sup>5</sup> Where, however, upon a bill to enjoin an alleged infringement of a trade mark, consisting of the name of a periodical published by plaintiff, if from the agreed statement of facts, upon which the case is submitted, it does not appear whether the public are actually deceived, or are in

<sup>1</sup> *Routh v. Webster*, 10 Beav., 561; *Welch v. Knott*, 4 Kay & J., 747; *Millington v. Fox*, 3 Myl. & Cr., 338.

<sup>3</sup> *Clement v. Maddick*, 1 Gif., 98.

<sup>4</sup> *Prowett v. Mortimer*, 2 Jur. N. S., 414.

<sup>2</sup> *Clement v. Maddick*, 1 Gif., 98; *Prowett v. Mortimer*, 2 Jur. N. S., 414.

<sup>5</sup> *Estes v. Williams*, 22 Blatch., 364; *Estes v. Leslie*, 27 Fed. Rep., 22.

danger of being deceived by the infringement as alleged in the bill, or whether plaintiff's customers or the public are induced to believe that defendant's publication is that of plaintiff, the case will be referred to a master to ascertain and report upon such matters before any relief will be granted.<sup>1</sup> And the proprietor of a newspaper which had for many years been established under the name of "Morning Post," was refused an injunction to prevent the use of the name "Evening Post" in the publication of a daily newspaper by defendant, there being no evidence of injury to plaintiff from the use of such name.<sup>2</sup>

§ 1100. Reasonable diligence must be used in making the application for relief against piracy of a trade mark, and proceedings should be instituted promptly upon the discovery of the fraud.<sup>3</sup> And where defendants had used the name which was sought to be enjoined for a period of more than nine years, with full knowledge on the part of complainant, such delay was held sufficient ground for dissolving the injunction.<sup>4</sup> And a delay of six months in instituting proceedings, plaintiff having full knowledge of all the circumstances, has been held sufficient ground for refusing relief.<sup>5</sup> But the person injured may relieve himself from the consequences of delay by showing that he had protested against the use of his mark.<sup>6</sup> And the fact that defendant has for many years made use of the trade mark in question, in advertising his article under that designation, will not deprive plaintiffs of relief by injunction when they are not shown to have acquiesced in such use, and when they have, by their own advertisements, cautioned the public against imposition.<sup>7</sup> So a plaintiff seeking relief in this

<sup>1</sup> *Osgood v. Allen*, 1 Holmes, 185. 265. See also *Filley v. Child*, 16

<sup>2</sup> *Borthwick v. Evening Post*, 37 Blatch., 376.  
Ch. D., 449.

<sup>3</sup> *Chappell v. Sheard*, 2 Kay & J., 117; *Estes v. Worthington*, 22 Fed. Rep., 822.

<sup>4</sup> *Amoskeag Co. v. Garner*, 55 Barb., 151; S. C., 6 Ab. Pr. N. S.,

<sup>5</sup> *Estcourt v. Estcourt Hop Essence Co.*, L. R. 10 Ch., 276.

<sup>6</sup> *Motley v. Downman*, 3 Myl. & Cr., 1; *Harrison v. Taylor*, 11 Jur. N. S., 408.

<sup>7</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75.

class of cases is justified in waiting a sufficient length of time to enable him to procure evidence that the use of the name or device in question by defendant does actually deceive the public by leading them to believe that defendant's business is that of plaintiff.<sup>1</sup>

§ 1101. It is also held that mere lapse of time upon the part of plaintiff, after learning of the infringement of his trade mark, will not of itself and independent of other circumstances deprive him of relief in equity, since the injunction in such cases is granted in aid of the legal right, and the right being clear, equity interposes its preventive aid for its protection.<sup>2</sup> And in proceedings for contempt in the violation of an injunction restraining the use of a trade mark, in order to deprive plaintiff of his right to carry on such proceedings upon the ground of his acquiescence, that acquiescence must be such as to create a new right in the defendant.<sup>3</sup>

<sup>1</sup> Lee v. Haley, L. R. 5 Ch., 155.

<sup>3</sup> Rodgers v. Nowill, 3 DeGex,

<sup>2</sup> Fullwood v. Fullwood, 9 Ch. D., M. & G., 614.

## III. PARTIES.

- § 1102. Agent; alien; tenants in common; defendants.
- 1103. Assignee; change in firm.
- 1104. Different persons entitled to same name.
- 1105. Defendants.

§ 1102. With regard to the parties entitled to the relief, it is held that the owner and his agent can not join in the action, although the agent's name appears on the trade mark.<sup>1</sup> But the relief resting upon the personal injury resulting from the use of complainant's mark, proceedings may be had against the offender wherever he resides, regardless of the *locus* of the offense. Hence an alien may bring the action, without averring that the goods of defendant have actually been sold within the jurisdiction where relief is sought.<sup>2</sup> Nor will the relief be refused an alien because similar relief is withheld from aliens in the country to which complainant belongs.<sup>3</sup> Where the trade mark is the property of several tenants in common, the relief may be had by either of them individually.<sup>4</sup> And every one engaging in the sale of the spurious goods may be enjoined as a party to the fraud.<sup>5</sup>

§ 1103. The property in a trade mark being susceptible of assignment to anyone who takes at the same time the right to manufacture or sell the particular merchandise to which the trade mark pertains, the assignee may enjoin an infringement of the right.<sup>6</sup> And where the mark thus assigned designates truly the place where the goods are manufactured, and indicates with a reasonable degree of certainty their ownership, the fact that owing to changes in

<sup>1</sup> Delondre v. Shaw, 2 Sim., 237.

<sup>5</sup> Coats v. Holbrook, 2 Sandf. Ch., 587.

<sup>2</sup> Taylor v. Carpenter, 11 Paige 202; Collins Co. v. Brown, 3 Kay & J., 423; Collins Co. v. Cowen, Ib., 428.

<sup>3</sup> Coats v. Holbrook, 2 Sandf. Ch., 587.

<sup>6</sup> Dixon v. Gruenheim, 2 Phil. Legal Gazette, 105; Julian v. Hoosier D. Co., 78 Ind., 408. And see Congress Co. v. High Rock Co., 45 N. Y., 291; S. C., 10 Ab. Pr. N. S., 848, reversing S. C., 57 Barb., 526.

<sup>4</sup> Dent v. Turpin, 2 J. & H., 139.

the firm, by death and otherwise, the name on the label is not the exact name of the manufacturers, does not constitute a sufficient objection to warrant a court of equity in withholding relief, in the absence of any attempt at deception.<sup>1</sup> So an assignee of the original manufacturer of a medical preparation, who has obtained the exclusive right to use the name given to such preparation by the original maker, may enjoin an infringement upon his right. And in such case, the fact that plaintiffs have expended much money in bringing their medicine into public use and have made its manufacture profitable and have invested their property in the business, while defendant has but recently and not extensively engaged therein, and is seeking to avail himself of the reputation which the efforts of others have given to the article, may properly be taken into account upon considering the application for the injunction.<sup>2</sup>

§ 1104. Where two persons are engaged in distinct and separate trades at different places, both having derived from a common predecessor the right to use a particular name as a trade mark, one of the two may maintain a bill in his own name to enjoin a piracy of his trade mark.<sup>3</sup>

§ 1105. In an action to enjoin the infringement of the name or title of a periodical published by plaintiffs, persons who are only engaged in selling the infringing publication may be joined with its publishers as defendants, the acts of both parties being kindred and they being engaged in a common injury to plaintiffs.<sup>4</sup>

<sup>1</sup> *Dixon v. Grugenheim*, 2 Phil. Legal Gazette, 105.

<sup>2</sup> *Filkins v. Blackman*, 18 Blatch., 440.

<sup>3</sup> *Dent v. Turpin*, 2 John. & H., 139.

<sup>4</sup> *Matzell v. Flanagan*, 2 Ab. Pr. N. S., 459.

## CHAPTER XIX.

### OF INJUNCTIONS PERTAINING TO CONTRACTS.

I.	NATURE AND GROUNDS OF THE JURISDICTION . . . . .	§ 1106
II.	PROMISSORY NOTES . . . . .	1123
III.	NEGATIVE CONTRACTS . . . . .	1134
IV.	CONTRACTS IN RESTRAINT OF TRADE . . . . .	1167

### I. NATURE AND GROUNDS OF THE JURISDICTION.

§ 1106.	Foundation of the relief.	
1107.	Remedy at law bars injunction; illustrations.	
1108.	Fraud a ground for relief.	
1109.	Specific performance.	
1110.	Injunctions against actions on contract.	
1111.	Railway-operating contracts.	
1112.	Contract of agency.	
1113.	Assignee of contract protected.	
1114.	Conveyance for church purposes; subscription to educational institution.	
1115.	Gaming contract.	
1116.	Usurious contracts.	
1117.	The same.	
1118.	Injunction against contract <i>pendente lite</i> .	
1119.	Plaintiff must come into court with clean hands; diligence required.	
1120.	Injunction in aid of specific performance.	
1121.	The same.	
1122.	The same as to chattels.	

§ 1106. While the remedy for past violations of contract is to be sought only in courts of law, the protection of contract rights and the enforcement of specific covenants are matters which are properly cognizable in courts of equity. The jurisdiction by way of interlocutory injunction to restrain the violation of contracts is based upon the necessity of protecting the legal right, and is exercised for the prevention of irreparable mischief. To warrant a court of



equity in interfering, the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages at law.<sup>1</sup> And a doubt as to the correctness of the construction of the contract on which the injunction is asked is sufficient ground for refusing to interfere.<sup>2</sup> Nor will an injunction be allowed to restrain the violation of a contract tainted with champerty and maintenance.<sup>3</sup> And if the contract is uncertain and vague in its provisions, or is of an unjust and oppressive character, the relief will be withheld.<sup>4</sup>

§ 1107. The fact that ample remedy exists at law for the violation of an agreement is always a sufficient objection to the interference of equity.<sup>5</sup> Thus, where a railway has been constructed under a contract whose terms provide for its construction in a particular manner, for the protection of the owners of real estate over which the road passes, the remedy for violation of the agreement is not by enjoining the use of the road until the terms of the contract are complied with, but by an action at law for pecuniary damages, and in such a case equity will not interfere.<sup>6</sup> So equity will not enjoin the assignment or transfer of an attachment bond upon the ground that it was fraudulent and void *ab initio*, since this would constitute a sufficient defense to an action at law upon the bond.<sup>7</sup> And where plaintiff held a license for the use of a patented invention at a certain rate for each machine made and sold, the licensors covenanting to grant no other licenses at a less rental with-

<sup>1</sup> *Morris C. & B. Co. v. The Society*, 1 Halst. Ch., 203; *Healy v. Allen*, 38 La. An., 867.

<sup>2</sup> *Morris C. & B. Co. v. The Society*, 1 Halst. Ch., 203.

<sup>3</sup> *Gregerson v. Imlay*, 4 Blatch., 503.

<sup>4</sup> *Mann v. Stephens*, 15 Sim., 379; *Kimberley v. Jennings*, 6 Sim., 340; *Talbot v. Ford*, 13 Sim., 173.

<sup>5</sup> *Pusey v. Wright*, 31 Pa. St., 387; *Elder v. Shaw*, 12 Nev., 78; *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, 8 Blatch., 113; *Burdon C. S. R. Co. v. Leverich*, 37 Fed. Rep., 67.

<sup>6</sup> *Pusey v. Wright*, 31 Pa. St., 387.

<sup>7</sup> *Elder v. Shaw*, 12 Nev., 78.

out a corresponding reduction to plaintiff, and also reserving the right to terminate the license upon a given notice upon the breach of any covenants by the licensee, upon a bill by plaintiff alleging that defendants had granted a license at a less rate, and seeking to enjoin defendants from giving the notice requisite to terminate the license, it was held that no case was presented for an injunction. In such case, the rights of the parties being only legal rights, ample relief might be had without invoking the aid of a court of equity.<sup>1</sup> And where plaintiff has entered into a contract with defendant to take charge of his plantation for a term of years, and to reside thereon and have exclusive control of its management, he can not enjoin defendant from interfering with his possession and control of the premises, since if defendant violates the contract relief may be had in damages.<sup>2</sup> So an injunction has been refused which was sought to restrain defendants from suing at law for the breach of a covenant to keep premises insured from fire.<sup>3</sup>

§ 1108. Fraudulent representations and oppressive conduct in obtaining an agreement or contract frequently afford ground for relief in equity to prevent its enforcement at law against the contracting party on whom the fraud was exercised. Thus, a perpetual injunction has been granted against proceedings at law to recover an annuity upon a contract entered into on the strength of mistaken and false representations as to the value of certain property.<sup>4</sup> And an injunction to prevent the sale of mortgaged premises has been made perpetual upon proof that through the influence of the mortgagee the mortgagor had, by habitual drunkenness, become reduced to a condition of imbecility

<sup>1</sup> *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, 8 Blatch., 113. But see, *contra*, *Florence Sewing Machine Co. v. Grover & Baker S. M. Co.*, 110 Mass., 1.

<sup>2</sup> *Seiler v. Fairex*, 23 La. An., 397.

<sup>3</sup> *White v. Warner*, 2 Meriv., 174.

459. As to the right to an injunction to prevent the violation of a charter party upon a vessel, as against a mortgagee with notice of the charter party, see *De Mattos v. Gibson*, 4 DeGex & J., 276.

<sup>4</sup> *Dale v. Roosevelt*, 5 Johns. Ch.,

bordering on insanity, the mortgagee being unable to show any valid consideration for the contract.<sup>1</sup> So an injunction may be granted to prevent an improper diversion of a specific fund, out of which, by agreement between the parties upon sufficient consideration, payment is to be made for certain stock subscribed.<sup>2</sup> So an injunction has been granted to restrain an action upon a contract which was delivered in violation of an agreement that it should be held in escrow until certain changes were made.<sup>3</sup> And one who discovers or invents a process of manufacture which he does not disclose to the public, has such a property therein, regardless of whether the process is patentable, as will be protected in equity by enjoining one who, in violation of his contract and in breach of confidence, undertakes to apply the process to his own use or that of third persons.<sup>4</sup>

§ 1109. It has frequently been held that the contract concerning which the injunction is sought must be of such a nature as to be susceptible of specific enforcement by decree, and that if the bill itself on which the injunction is sought fails to show such a contract, the injunction, which is intended in aid of the general relief sought, will not be allowed.<sup>5</sup> In accordance with this doctrine, it is held not to be sufficient that the legal right under the contract and its violation are clearly made out, since, if the agreement is of such a nature that a court of equity can not enforce specific performance of its terms, or if the injury is one for which ample redress may be had at law, equity will not interfere.<sup>6</sup>

<sup>1</sup> *Van Horn v. Keenan*, 28 Ill., 445.

<sup>2</sup> *Ashe v. Johnson's Adm'r*, 2 Jones Eq., 149.

<sup>3</sup> *Wyckoff v. Victor S. M. Co.*, 43 Mich., 309.

<sup>4</sup> *Peabody v. Norfolk*, 98 Mass., 452. Complainant in this case had built a mill and furnished it with machinery invented by himself for manufacturing cloth by a secret process. An engineer in his employ, who had contracted not to

give information concerning the machinery, but to preserve the process a secret, was enjoined from violating his contract.

<sup>5</sup> *Canton Co. v. Northern R. R.*, 21 Md., 383; *Fothergill v. Rowland*, L. R. 17 Eq., 132; *Peacock v. De-weese*, 73 Ga., 570. And see *Equitable Co. v. Baltimore Co.*, 63 Md., 285; *Railroad Co. v. Telegraph Co.*, 38 Ohio St., 24.

<sup>6</sup> *Collins v. Plumb*, 16 Ves., 454;

So in the case of a contract for the sale and delivery of all the coal from defendant's colliery for a given period and a fixed price, the contract being of such a nature that equity can not specifically enforce it, it will not interfere by injunction to prevent its violation, but will leave the party aggrieved to his remedy at law.<sup>1</sup> So upon a bill for the specific performance of an agreement to convey certain mining interests in lands, equity will not grant an injunction in aid of the action when the contract is unilateral, defendant having merely an option to purchase, but being under no obligation so to do, the case, therefore, not being such as to warrant a decree for specific performance.<sup>2</sup> The doctrine as above stated is, however, by no means inflexible, and if the case presented is such that the negative remedy by injunction will do substantial justice between the parties by obliging defendant, either to carry out his contract, or to lose all benefit of the breach, and if the legal remedy is inadequate and no reason of policy is shown to the contrary, equity may restrain the violation of a contract, although unable to specifically enforce it.<sup>3</sup>

§ 1110. Equity may interfere by injunction to restrain an action at law upon a contract, such as a lease, when such relief is necessary to prevent the instrument being used contrary to its expressed intention, and when its enforcement would be against conscience.<sup>4</sup> And in an action brought to procure the correction of an alleged mistake in a contract an injunction has been allowed to prevent a forfeiture upon the contract and the bringing suit thereon, upon plaintiff paying into court, during the pendency of

Munroe v. Wivenho R. Co., 11 Jur. N. S., 613.

<sup>1</sup> Fothergill v. Rowland, L. R. 17 Eq., 132.

<sup>2</sup> Peacock v. Deweese, 73 Ga., 570.

<sup>3</sup> Singer Manufacturing Co. v. Union Co., 6 Fish., 480; S. C., 1 Holmes, 253. See also Lumley v.

Wagner, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG. & Sm., 485, and overruling Kemble v. Kean, 6 Sim., 333; Kimberley v. Jennings, 6 Sim., 340.

<sup>4</sup> Reade v. Armstrong, Drury t. Napier, 55; S. C., 7 Ir. Ch., 375, affirming S. C., Ib., 266.

the action, all sums of money due from him under the agreement.<sup>1</sup>

§ 1111. It is also held that where a railway company is in possession of the line of another company, operating it under a joint contract between the two companies, it may be enjoined from violating the agreement by diverting traffic from plaintiff's line which, by the terms of the agreement, it is bound to carry over plaintiff's road.<sup>2</sup> But where a railway company had agreed with certain contractors that they should work its line and keep its rolling stock and material in repair for a given time at a specified compensation, with a provision for terminating the contract, upon notice by the company, for a failure on the part of the contractors to comply with such notice, it was regarded as a contract of such a nature that equity would not interfere by injunction to restrain the railway company from determining it and resuming possession of the line.<sup>3</sup>

§ 1112. A court of equity will not interfere by injunction for the purpose of compelling defendant to retain the plaintiff in his employ in the capacity of an agent, in accordance with the terms of a contract or agreement for such employment. And it affords sufficient ground for refusing the relief in such a case, that the duties of an agent are in the nature of personal services, and as such are incapable of being enforced in equity.<sup>4</sup>

§ 1113. The jurisdiction of equity for the protection and enforcement of contract rights is not limited to the original parties to the agreement, but may be exercised in favor of their assignees, and may be invoked in their behalf in aid of proceedings at law. And where one has parted with his equitable interest in a contract not assignable at law, he may be restrained from interfering with or preventing the

<sup>1</sup> *Humphreys v. Hurtt*, 3 Hun, 216; S. C., 5 Thomp. & C., 433.

<sup>3</sup> *Johnson v. Shrewsbury & B. R. Co.*, 3 DeGex, M. & G., 914.

<sup>2</sup> *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, L. R. 16 Eq., 433.

<sup>4</sup> *Mair v. Himalaya Tea Co.*, L. R. 1 Eq., 411.

use of his name by the assignee in enforcing the contract by action at law, or from attempting to dismiss the action.<sup>1</sup>

§ 1114. Where real estate is conveyed to the trustees of a religious association to be used as a place of worship, in accordance with the doctrines and forms of a particular church, the contract may be protected in equity by restraining its violation. And if ministers of a different faith, who are not recognized by the church prescribed as the standard, are permitted to officiate in the church, there is such a departure from the trust created by the original contract as to warrant a court of equity in interfering.<sup>2</sup> And persons who have contributed to a fund raised by subscription, on condition that an educational institution should be permanently located at a specified place, are entitled to the aid of equity to restrain its removal from such place. The jurisdiction in such case is exercised upon the ground that the acceptance of the conditions constitutes a contract, the attempted violation of which may be enjoined.<sup>3</sup>

§ 1115. In the case of a contract void for want of sufficient consideration, as a note or bond given for money lost at gaming, the defense being one of a purely legal nature, equity will not interfere to restrain the enforcement of a judgment, where no defense was interposed to the action at law and no excuse is offered for having failed to defend.<sup>4</sup> If, however, defendant is prevented by surprise from asserting his defense to an action upon a gaming contract, he will not be debarred from relief in equity, even though he made no effort to obtain a new trial in the action at law.<sup>5</sup> If it is doubtful whether the contract on which a judgment has been obtained was given for a gaming consideration, and is therefore void, and if there is also doubt as to whether the judgment creditor to whom the debt was transferred

<sup>1</sup> *Deaver v. Eller*, 7 Ired. Eq., 24.

<sup>3</sup> *Hascall v. Madison University*,

<sup>2</sup> *Attorney-General v. Welsh*, 4 8 Barb., 174.

*Hare*, 572. For further illustrations of the same principle, see Chapter V, *ante*.

<sup>4</sup> *Giddens v. Lea*, 3 Humph., 133; *Jones v. Jones*, N. C. Term R., 110.

<sup>5</sup> *White v. Washington's Ex'r*, 5 Grat., 645.

took it under the belief that the consideration was lawful, a preliminary injunction granted against the judgment may be retained until the facts can be determined.<sup>1</sup> But it has been held, under a statute prohibiting gaming, that a judgment founded upon a gaming contract may be enjoined, although the contract has been assigned to an innocent holder, ignorant of its origin, and although no defense was interposed at law.<sup>2</sup>

§ 1116. Proceedings at law for the enforcement of usurious contracts will, as a general rule, be enjoined only upon condition that the party aggrieved make actual payment or tender of the amount really due.<sup>3</sup> But if defendant answers without availing himself of this objection, an injunction already granted will not be dissolved where complainant offers to pay the amount actually due.<sup>4</sup> But where an injunction is allowed to prevent a sale of land under a trust deed, until the question of usury can be determined, and a verdict at law determines that the contract was usurious, the injunction should not be perpetuated for the entire amount, but only for that portion which is usurious.<sup>5</sup> While an injunction may properly be allowed against the sale of real estate under a deed of trust to secure a contract alleged to be usurious, until the question of usury can be determined, or until the lender can establish the validity of his contract at law, on the ground that the proceedings being *in pais*, the borrower is without his day in court, yet if the usurious contract embraces likewise a pre-existing, valid debt, unaffected by the usurious debt, or by being coupled therewith, a different rule applies, and proceedings to enforce the debt secured by the deed of trust will not be

<sup>1</sup> Nelson's Adm'r v. Armstrong, 5 Grat., 354.

<sup>2</sup> Woodson v. Barrett, 2 Hen. & M., 80. And see Skipwith v. Strother, 3 Rand., 214.

<sup>3</sup> Morgan v. Schermerhorn, 1 Paige, 544; Miller v. Ford, Saxt., 358; Rogers v. Rathbun, 1 Johns.

Ch., 367; Tupper v. Powell, Ib., 439; Fanning v. Dunham, 5 Johns. Ch., 122; Turpin v. Povall, 8 Leigh, 93. But see Wilhelmson v. Bentley, 25 Neb., 473.

<sup>4</sup> Morgan v. Schermerhorn, 1 Paige, 544.

<sup>5</sup> Bell v. Calhoun, 8 Grat., 22.

restrained for the purpose of compelling the obligee in the bond to establish his claim at law.<sup>1</sup> And it is to be observed that in those cases where preliminary injunctions are granted to restrain the enforcement of deeds of trust, on the ground that the contract to secure which they were given was usurious, the relief is continued only until the question of usury can be determined. If, therefore, the validity of the contract is fully established, the injunction will be dissolved; otherwise it may be made perpetual.<sup>2</sup>

§ 1117. While, as we have thus seen, equity may under some circumstances interfere to prevent the enforcement of contracts tainted with usury, yet if the cause has been submitted to a legal forum and there decided, a court of equity will not afford relief against the judgment, in the absence of any special circumstances of fraud, or complicated and embarrassing facts connected with the transactions alleged to be usurious. In all such cases it is a sufficient objection to the exercise of the jurisdiction that the usury, if any, might have been urged as a defense to the action at law, and defendant having neglected to avail himself of the opportunity of defending in the legal forum, is debarred from relief in equity.<sup>3</sup> If, however, the remedy at law is surrounded with embarrassment and difficulty, the transaction involving a large number of usurious securities, and being exceedingly complex in its nature in consequence of the devices resorted to for the purpose of concealing the usury, a court of equity may properly extend its aid by injunction.<sup>4</sup>

§ 1118. Although equity has undoubted jurisdiction to restrain parties from entering into such contracts, pending litigation, as may embarrass plaintiff in his action at law,

<sup>1</sup> *Marks v. Morris*, 2 Munf., 407; *Bank of Washington v. Arthur*, 3 Grat., 173.

<sup>2</sup> *Marks v. Morris*, 2 Munf., 407; *Martin v. Lindsay's Adm'rs*, 1 Leigh, 499; *Fitzhugh v. Gordon*, 2 Leigh, 626.

<sup>3</sup> *Lindsley v. James*, 3 Cold., 477;

*Morgan v. England*, Wright (Ohio), 112; *Lansing v. Eddy*, 1 Johns. Ch., 49; *Buchanan v. Nolin*, 3 Humph., 63; *McKoin v. Cooley*, Ib., 559.

<sup>4</sup> *Frierson v. Moody*, 3 Humph., 561.



yet this jurisdiction is to be exercised in the sound discretion of the court, after weighing the relative convenience and inconvenience likely to result to the parties. And where it is apparent that the injury which would result to the plaintiff by refusing the injunction, as compared with that which defendant would sustain by granting the relief, is extremely small, the relief will be withheld.<sup>1</sup>

§ 1119. He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands, and to entitle himself to relief he must have carried out, so far as possible, his own part of the contract.<sup>2</sup> So, too, he must show that he has used reasonable diligence in asserting his rights and in demanding their protection, and unreasonable delay in seeking the aid of a court of equity, or acquiescence in the violation of the agreement in question, will generally prove a bar to the exercise of the jurisdiction.<sup>3</sup> Nor will a court of equity interfere to compel the

<sup>1</sup> *Shrewsbury & C. R. Co. v. Shrewsbury & B. R. Co.*, 1 Sim. N. S., 410. The following observations of the Vice Chancellor in this case clearly present the grounds on which relief is refused: \* \* \* "Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between *interim* interference and *non interim* interference, the bal-

ance greatly preponderates in favor of the defendant and against the plaintiff. Now, here, the injury to the plaintiffs, in comparison with the injury to the defendants, is extremely small. \* \* \* And, on the whole, if the convenience and the inconvenience are weighed against each other, the inconvenience seems to me to preponderate, beyond all measure, in favor of the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction."

<sup>2</sup> *Stiff v. Cassell*, 2 Jur. N. S., 348; *Fechter v. Montgomery*, 33 Beav., 22; *Healy v. Allen*, 38 La. An., 867.

<sup>3</sup> *Powell v. Allarton*, 4 L. J. Ch. N. S., 91; *Maythorne v. Palmer*, 11 Jur. N. S., 230; *Roper v. Williams*, 1 Turn. & R., 18.

giving up of a contract made for a fraudulent purpose, or to restrain an action at law upon it, when plaintiff himself; the obligor in the contract, was a participant in the fraud.<sup>1</sup> And where defendant sells his business to plaintiffs, agreeing to carry it on as superintendent under their direction, plaintiffs can not enjoin defendant from a violation of his part of the agreement when they themselves have been guilty of a deliberate violation of its terms.<sup>2</sup>

§ 1120. To warrant a court of equity in granting an injunction in aid of the specific performance of a contract, when the injury apprehended is not susceptible of compensation in damages, it will usually suffice if complainant establishes a *prima facie* case entitling him to specific performance, and it is not necessary that it should conclusively appear that he will maintain his case upon the final hearing.<sup>3</sup> And an injunction to restrain the sale of real estate is proper in aid of a bill to enforce the specific performance of a contract for its conveyance.<sup>4</sup> It is to be observed, however, that an injunction in aid of specific performance, being merely ancillary to the main purpose of the bill, is dependent upon that and must stand or fall with the bill. And where it appears that the contract which it is sought to enforce specifically is not concluded or certain in all its parts, so as to be properly enforced, the injunction will be dissolved for want of equity in the bill.<sup>5</sup> So, too, if there are disputes concerning the rights of the parties under the contract, such disputes involving the very terms and obligation of the contract itself, an injunction will be withheld until the rights of the parties are ascertained and adjusted.<sup>6</sup> And if, upon the case as made out by the bill, complainant

<sup>1</sup> *Hamilton v. Ball*, 2 Ir. Eq., 191.

<sup>2</sup> *Telegraph Co. v. McLean*, L. R. 8 Ch., 658.

<sup>3</sup> *Powell v. Lloyd*, 1 Y. & J., 427; *Attwood v. Barham*, 2 Russ., 186; *Crosbie v. Tooke*, 1 Myl. & K., 433; *Chambers v. Alabama I. Co.*, 67 Ala., 353.

<sup>4</sup> *Curtis v. Marquis of Buckingham*, 3 Ves. & B., 168.

<sup>5</sup> *McKibbin v. Brown*, 1 McCart., 13.

<sup>6</sup> *Brown's Appeal*, 62 Pa. St., 17. See also *Domestic Telegraph Co. v. Metropolitan Telephone Co.*, 39 N. J. Eq., 160.

is not entitled to a specific performance, he can not have an injunction, which is merely ancillary to the principal object of the suit.<sup>1</sup> Thus, where plaintiffs were employed by a railway company as contractors to build a part of its road, to be paid in shares and debentures of the company, upon a bill by plaintiffs for specific performance, the court being of opinion that it could not enforce the contract upon the part of plaintiffs refused to enjoin defendant from transferring the shares to others, leaving the parties to their remedy at law.<sup>2</sup> So when the agreement in question is for the performance of an affirmative act, and from the nature of the contract the court is unable to enforce its specific performance, it will not grant an injunction against a breach of the undertaking, such relief being merely ancillary to the principal relief sought by the action.<sup>3</sup>

§ 1121. Upon similar principles, it is held that an injunction will not be granted in aid of an action for specific performance, when the agreement which it is sought to enforce is so uncertain in its terms as not to be the subject of a decree for specific performance.<sup>4</sup> So when there has been such a departure from the original agreement that the court will not decree its performance, an injunction sought in aid of specific performance will not be allowed.<sup>5</sup> And in an action by a purchaser to procure the specific performance of a contract for the purchase of leasehold property, in which it is sought to restrain the vendor from re-selling the property, the court will weigh the considerations of relative convenience and inconvenience to the respective parties; and if the inconvenience to plaintiff from refusing appears less than that to defendant from granting the injunction, it will not be allowed in a doubtful case, and when defendants appear likely to succeed in the litigation in the end.<sup>6</sup>

<sup>1</sup> *Allen v. Burke*, 2 Md. Ch., 534;  
*Peto v. Brighton R. Co.*, 1 Hem. &  
M., 468.

<sup>2</sup> *Peto v. Brighton R. Co.*, 1 Hem.  
& M., 468.

<sup>3</sup> *Baldwin v. Society*, 9 Sim., 393.

<sup>4</sup> *South Yorkshire R. Co. v. Great  
Northern R. Co.*, 1 Sm. & Gif., 324.

<sup>5</sup> *Paris Chocolate Co. v. Crystal  
Palace Co.*, 3 Sm. & Gif., 119.

<sup>6</sup> *Hadley v. Bank of Scotland*, 3  
DeGex, J. & S., 63.

§ 1122. Where plaintiff seeks the specific performance of a contract for the sale of a chattel, and, upon the case presented, he is plainly entitled to the relief sought, he may have the aid of an injunction to prevent the removal of the chattel beyond the jurisdiction of the court.<sup>1</sup> So where the contract is to furnish to plaintiff a chattel of a special and peculiar value, which is indispensable to his business and which can not be obtained elsewhere in that vicinity, so that damages at law would afford an inadequate remedy, the contract may be enforced specifically and an injunction may be allowed to prevent the defendant from otherwise disposing of the subject-matter of the contract, although the restriction against otherwise disposing of it may be inferred only from the positive terms of the agreement.<sup>2</sup>

<sup>1</sup> *Hart v. Herwig*, L. R. 8 Ch., 860.

<sup>2</sup> *Equitable Co. v. Baltimore Co.*, 63 Md., 285.

## II. PROMISSORY NOTES.

- § 1123. Fraud or duress a ground for relief.
- 1124. Violations of trust; parties.
- 1125. Effect of injunction restraining payment of note.
- 1126. Fraud; undue influence; threats.
- 1127. Marriage brokerage; foreign court; gaming.
- 1128. Set-off and insolvency.
- 1129. Failure of consideration; defense at law; purchase of vessel.
- 1130. Plaintiff must do equity.
- 1131. Accommodation paper.
- 1132. Injunction in behalf of administrator.
- 1133. Effect of injunction; statute of limitations; interest.

¶§ 1123. The aid of equity is sometimes invoked to restrain the collection of commercial paper, when its enforcement would be inequitable and against conscience. And it may be asserted as a rule that where promissory notes have been obtained by fraud or duress, or by undue influence and without adequate consideration, an injunction may be properly granted to restrain their collection or negotiation, if in the hands of the payee.<sup>1</sup> Thus, where complainant has been induced to give his notes and a mortgage, upon threats of a prosecution for perjury, which threats were utterly groundless, the collection of the securities will be restrained.<sup>2</sup> So undue influence exercised upon the maker of a note, who was a person of weak mind and constantly given to intoxication, has been deemed sufficient ground for enjoining a suit upon the note.<sup>3</sup> So, too, fraudulent representations in the sale of a patent right, and the failure of the patent which constituted the original consideration for which the notes were given, have been held sufficient to warrant an injunction against their collection.<sup>4</sup> And an injunction has been allowed to restrain the collection of

<sup>1</sup>Sackett v. Hillhouse, 5 Day, 15 Neb., 57; Lyster v. Stickney, 12 551; Darst v. Brockway, 11 Ohio, Fed. Rep., 609.

462; James v. Roberts, 18 Ohio, <sup>2</sup>James v. Roberts, 18 Ohio, 548.

548; Rembert v. Brown, 17 Ala., <sup>3</sup>Rembert v. Brown, 17 Ala., 667.

667; Robinson v. Jefferson, 1 Del. <sup>4</sup>Sackett v. Hillhouse, 5 Day, 551; Ch., 244; Hullhorst v. Scharner, Darst v. Brockway, 11 Ohio, 462.

notes procured by the payee through fraud and imposition, and upon his agreement to convey as a consideration for the notes an interest in letters patent, which he has failed to do.<sup>1</sup>

§ 1124. Where one has received commercial paper which has been entrusted to him for a special use or purpose, and, in breach of the trust reposed in him, he attempts to convert the paper to a different use, he may be enjoined from any act, such as carrying on a suit at law, which may be the means or instrument of a violation of the trust. And the assignees of such note, taking it under circumstances sufficient to apprise them of the fraud or breach of trust, may be enjoined from proceedings at law for its enforcement.<sup>2</sup> But if a note has passed into the hands of a *bona fide* holder for valuable consideration, proceedings at law for its collection will not be restrained on the ground of fraudulent representations by the payee to the maker.<sup>3</sup> Nor will the fact that a payment was made upon the note while in the hands of the payee, who assigned it without indorsing the payment, warrant an injunction to restrain proceedings under a judgment recovered by the assignee of the note.<sup>4</sup>

§ 1125. As regards the effect of a temporary injunction restraining the payment of a note, where the makers and guarantor have been enjoined from making payment, it is held that the writ constitutes no bar to the recovery of a judgment upon the note itself.<sup>5</sup> But in no event should parties be enjoined from the payment of notes who are not made defendants in the bill, and an injunction granted against such persons will be dissolved because of the non-joinder.<sup>6</sup>

<sup>1</sup> Robinson v. Jefferson, 1 Del. Ch., 244.

<sup>2</sup> Atlantic Delaine Co. v. Tredick, 5 R. I., 171.

<sup>3</sup> Dougherty v. Scudder, 2 C. E. Green, 248.

<sup>4</sup> Cummins v. Bentley, 5 Ark., 9.

<sup>5</sup> Campbell v. Gilman, 26 Ill., 120.

<sup>6</sup> Fellows v. Fellows, 4 Johns. Ch., 25.

§ 1126. The negotiation of commercial paper may be enjoined when it was obtained through fraudulent or improper conduct rendering it against conscience to enforce it, and when there is danger of its passing into the hands of innocent purchasers for valuable consideration and without notice, whereby the maker would be cut off from asserting his defense at law.<sup>1</sup> And undue influence used in obtaining a note will warrant the court in enjoining its collection. Thus, in the case of a young woman who had just attained her majority, and who was induced through the representations of her relatives, with whom she lived and by whom she was largely controlled, to give a promissory note, without consideration and in ignorance of its terms, an injunction was allowed against the enforcement of judgment upon the note.<sup>2</sup> So where notes have been inequitably and unjustly extorted from complainant by force of judicial process, issued contrary to an express agreement, and such notes are without consideration in fact or in law, the payee may be enjoined from putting them in circulation by assignment or otherwise.<sup>3</sup>

§ 1127. In an early English case, upon a bill to enjoin the bringing of an action upon a promissory note given for the consideration of marriage brokage, Lord Hardwicke enjoined defendant from assigning or indorsing the note to

<sup>1</sup> *Hood v. Aston*, 1 Russ., 412; *Sharp v. Arbuthnot*, 13 Jur., 219; *Green v. Pledger*, 3 Hare, 165; *Thurman v. Burt*, 53 Ill., 129.

<sup>2</sup> *Espey v. Lake*, 10 Hare, 260. "I take it to be quite clear," says the Vice Chancellor, "that the principles of this court go to this extent — that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust or anything approaching to the relation of guardian and ward, or of standing in *loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favor the security is made, or by the party who was the medium or instrument of obtaining it."

<sup>3</sup> *Thurman v. Burt*, 53 Ill., 129.

any person, but refused to extend the injunction so far as to prevent him from proceeding at law.<sup>1</sup> So an injunction was allowed to restrain suits upon bills of exchange which had been declared void by the judgment of a foreign court having jurisdiction over the matter.<sup>2</sup> And an interlocutory injunction has been granted to restrain the negotiation of negotiable paper given for money lost at gaming.<sup>3</sup>

§ 1128. The question of insolvency is sometimes a controlling question in the class of cases under consideration, and an injunction may properly be allowed to prevent the negotiation and collection of promissory notes for the purpose of establishing a set-off between the parties when defendants are insolvent. Thus, where plaintiffs and defendants are mutually indebted each to the other upon certain promissory notes, but defendants have become insolvent and have stopped payment, they may be enjoined from negotiating or transferring plaintiffs' notes held by them, since it would be inequitable and unjust to permit defendants to dispose of plaintiffs' notes, leaving their indebtedness to plaintiffs unpaid.<sup>4</sup> So equity has jurisdiction to restrain the negotiation of promissory notes given for the purchase price of articles of personal property, upon the ground of fraudulent representations as to title or quality, where both parties did not have the same means of information, and where the vendor has become insolvent.<sup>5</sup> And where a promissory note secured by a chattel mortgage is given to one as trustee for another, and the real owner becomes insolvent, the maker may maintain a bill for an injunction to restrain the payee from transferring the note before maturity and from foreclosing the mortgage, upon the ground of failure of consideration in the original transaction.<sup>6</sup>

<sup>1</sup> *Smith v. Aykwell*, 3 Atk., 566. Ch., 720. See, as to the circum-

<sup>2</sup> *Burrows v. Jamereau*, Dick., 48.

<sup>3</sup> *Lloyd v. Gurdon*, 2 Swanst., 180.

<sup>4</sup> *Lindsay v. Jackson*, 2 Paige,

581.

<sup>5</sup> *Bridges v. Robinson*, 2 Tenn. 547.

stances under which such an injunction will be dissolved, S. C., 3 Tenn. Ch., 352.

<sup>6</sup> *Belohradsky v. Kuhn*, 69 Ill.,



§ 1129. But the failure of the consideration upon which a note was given does not of itself constitute sufficient ground for enjoining the prosecution of an action thereon, when such matter would furnish a clear defense in a court of law, in which the question could be tried more satisfactorily than in a court of equity.<sup>1</sup> Nor will equity interfere to enjoin the transfer of a promissory note which is past due, and as to which the maker has a perfect defense at law.<sup>2</sup> And a purchaser of a chattel, such as a vessel, can not enjoin the negotiation of notes given for the unpaid purchase money, upon the ground of alleged defects in the article sold; which, if they existed at all, were apparent at the time of his purchase.<sup>3</sup>

§ 1130. In applications for injunctions against the negotiation of promissory notes the plaintiff must himself do equity before he is entitled to relief. And one who has borrowed money from a bank in excess of the amount which the bank could lawfully lend and given notes and securities therefor, can not enjoin the bank from negotiating such notes and securities upon the ground of its violation of the law in making the loan.<sup>4</sup>

§ 1131. The maker of accommodation paper, which is held by a bank as collateral security to an indebtedness of the person for whose accommodation the notes were given, can not enjoin the collection of such notes, even though the bank holds other security for the indebtedness, and although the bill alleges that the notes were given upon fraudulent representations; since the maker in such case does not occupy the position of a surety entitled to compel a creditor holding two funds as security to resort to that one upon which the surety has no claim.<sup>5</sup>

<sup>1</sup>Hodgson v. Murray, 3 Sim., 283, reversing S. C., 2 Sim., 516. But see Teed v. Marvin, 41 Mich., 216, where an injunction was sustained against the enforcement of notes and a mortgage given without consideration.

<sup>2</sup>Galusha v. Flour City Bank, 1 Hun, 573; S. C., 4 Thomp. & C., 68.

<sup>3</sup>Lynch v. Kennedy, 27 La. An., 464.

<sup>4</sup>Elder v. Bank of Ottawa, 12 Kan., 238.

<sup>5</sup>Prout v. Lomer, 79 Ill., 331.

§ 1132. An injunction has been allowed in behalf of an administrator to restrain the bringing of actions upon promissory notes which were indorsed by the intestate in his life-time, but which were never delivered until after his death, and which remained his property at the time of his death.<sup>1</sup>

§ 1133. The granting of an injunction to restrain a sale of real property under a deed of trust securing the payment of promissory notes has the effect of suspending the statute of limitations upon the notes themselves.<sup>2</sup> But as regards the effect of a transfer or assignment of a promissory note after the granting of an injunction against such transfer, it is held that the assignment is not absolutely void, but only void so far as concerns the rights of plaintiff in the injunction suit, and the assignee holds the note subject to such rights.<sup>3</sup> And the fact that the makers of promissory notes have been enjoined from paying them to a claimant, pending a litigation as to their ownership, would seem not to prevent the collection of interest upon such notes, since, notwithstanding the injunction, the payees might pay the money into court, and not having done so, they are properly chargeable with interest.<sup>4</sup>

<sup>1</sup> Carr v. Silloway, 111 Mass., 24.

<sup>4</sup> McKnight v. Chauncey, Sel-

<sup>2</sup> Williams v. Pouns, 48 Tex., 141. den's Notes, 97.

<sup>3</sup> Wilhoit v. Castell, 3 Baxter, 419.

## III. NEGATIVE CONTRACTS.

- § 1134. The remedy analogous to specific performance.  
1135. Relative convenience.  
1136. The same.  
1137. Certainty; damages; threatened breach.  
1138. When covenant controlled by recitals.  
1139. Penalty and liquidated damages.  
1140. The same.  
1141. Present and reversionary interests.  
1142. Restrictive covenants in leases.  
1143. The same illustrated.  
1144. Further illustrations; sub-lessee.  
1145. Further illustrations.  
1146. Applications of the doctrine.  
1147. The doctrine as affected by fraud.  
1148. Relief in behalf of receiver.  
1149. Lessee of adjoining premises not entitled to injunction.  
1150. Lessor enjoined from breach of restrictive covenant; mandatory injunction.  
1151. The doctrine further illustrated; subsequent lessees of original lessor enjoined.  
1152. Covenant need not run with the land.  
1153. Restrictive covenants in conveyances of realty.  
1154. Relief extended for and against purchasers and assigns.  
1155. Illustrations of the general doctrine.  
1156. Construction of the term "adjoining."  
1157. Relief as between different purchasers.  
1158. Damage need not be shown; vendor enjoined from breach; change in adjoining lands.  
1159. Diligence; laches; acquiescence.  
1160. Contract of hiring and service.  
1161. Telegraph company; covenant against imparting information.  
1162. Impossibility of specific performance ground for refusing injunction.  
1163. Contracts for theatrical and operatic performances; former doctrine.  
1164. The later doctrine; negative covenant implied.  
1165. Negative agreement distinct from affirmative.  
1166. Purely negative contract; partners; jurisdiction of court.

§ 1134. The remedy by injunction to prevent the violation of negative agreements, or contracts not to do a particular thing, is closely akin to the remedy by way of specific

performance of agreements of an affirmative nature. In both cases the object sought is substantially one and the same, and by enjoining the violation of a negative contract a court of equity in effect decrees its specific performance.<sup>1</sup> Thus, in the case of an author who has contracted to write for a publisher and covenanted that he will not write for any other during the continuance of his agreement, an injunction will be allowed to restrain another publisher from employing him, thus, in effect, enforcing the performance of the contract.<sup>2</sup> So an author who has sold a work with an express stipulation that he will do nothing to interfere with its publication may be enjoined from publishing another work upon the same subject, whose publication would hinder and impede the sale of the first.<sup>3</sup>

§ 1135. In the exercise of its jurisdiction by injunction to restrain the violation of contracts equity looks only to the terms of the contract itself, and is not governed by considerations of the relative convenience and inconvenience to the parties likely to result from granting or withholding the relief. And if the contract right is clearly established and the violation is apparent, the agreement being of such a nature as to be capable of specific enforcement, an injunction may be granted regardless of the inconvenience to defendants.<sup>4</sup> Nor will it avail against the granting of the writ that the act complained of will be productive of no injury to the complainant, and may even be beneficial to him, since it is for him to say whether the agreement shall be preserved, or whether he shall permit it to be violated. And the fact of the violation of the contract being established, the court may interfere without requiring proof of actual damage.<sup>5</sup> Nor will it avail defendant that the work

<sup>1</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604; *Stiff v. Cassell*, 2 Jur. N. S., 348.

<sup>2</sup> *Stiff v. Cassell*, 2 Jur. N. S., 348.

<sup>3</sup> *Barfield v. Nicholson*, 2 Sim. & St., 1; S. C., 2 L. J. Ch., 90.

<sup>4</sup> *Tipping v. Eckersley*, 2 Kay & J., 264; *Storer v. Great Western R. Co.*, 2 Y. & C. C. C., 48.

<sup>5</sup> *Dickenson v. Grand Junction Canal Co.*, 15 Beav., 270. And see *Ingram v. Morecraft*, 38 Beav., 49;

undertaken in violation of the agreement is one of great public importance, or that great inconvenience is likely to result to the public in case he is compelled to perform his agreement.<sup>1</sup> Nor will equity lend its aid by injunction in this class of cases when the covenant in question is too vague and uncertain to be specifically enforced, but will leave the party aggrieved in such case to pursue his remedy, if any, at law.<sup>2</sup>

§ 1136. The rule as laid down in the preceding section is to be accepted with the qualification that considerations of the relative convenience and inconvenience to the parties are rejected only when the covenants themselves are clear and free from doubt, and their violation is clearly established, and where irreparable injury is likely to result unless the breach is restrained. But, if these conditions do not co-exist, the question to be determined is one of comparative injury, and the court will be governed by considerations of the relative inconvenience likely to result to the parties from granting or refusing the relief.<sup>3</sup> And upon an application for an interlocutory injunction to restrain a breach of covenant, if the question is involved in doubt, the burden rests upon the party complaining to show that the balance of convenience is in favor of granting the injunction.<sup>4</sup> But the relief will not be withheld merely because the agreement contains other covenants which are likely to be broken in the future.<sup>5</sup>

§ 1137. Certainty is an essential element in the contract whose enforcement is sought by injunction, and where a covenant is indefinite and uncertain in its provisions no injunction will be allowed.<sup>6</sup> So, too, it is usually requisite

*Steward v. Winters*, 4 Sandf. Ch., 587.

<sup>3</sup> *Wilkinson v. Rogers*, 12 W. R., 284.

<sup>1</sup> *Lloyd v. London, C. & D. R. Co.*, 2 DeGex, J. & S., 568; *Raphael v. Thames Valley R. Co.*, L. R. 2 Ch., 147; *Foster v. Birmingham R. Co.*, 2 W. R., 378.

<sup>4</sup> *Child v. Douglas*, 5 DeGex, M. & G., 739, reversing S. C., Kay, 560.

<sup>5</sup> *Rigby v. Great Western R. Co.*, 15 L. J. Ch., 271.

<sup>6</sup> *Low v. Innes*, 10 Jur. N. S., 1037.

<sup>2</sup> *Armstrong v. Courtenay*, 15 Ir. Ch., 138.

that the party aggrieved should show some appreciable damage as the result of the breach of covenant which he seeks to restrain. And a grantee with covenants of quiet enjoyment will not be allowed an injunction to prevent his grantor from raising the level of a stream running through the premises of the grantor and past those of the grantee, where no damages result from the act which are susceptible of appreciation, there being no covenant against doing that particular act.<sup>1</sup> It is not, however, requisite that the breach of covenant against which preventive relief is sought in equity should have been actually committed at the time of making the application, and it is a sufficient ground of interference that defendant insists upon his right to do the act in question.<sup>2</sup> But equity will not assume that defendant intends to violate his covenant and will not interpose unless it is manifest that a breach is intended.<sup>3</sup>

§ 1138. While a covenant in an instrument may, if ambiguous, be controlled by the recitals in the same instrument,<sup>4</sup> yet if it contains an absolute covenant not to do a particular act, such covenant will not, in the absence of any proceedings to rectify the agreement, be controlled by a recital from which it appears that the parties intended that the act might be done upon payment of a fixed sum by way of liquidated damages, and an interlocutory injunction will issue to restrain the breach of the covenant.<sup>5</sup> But the fact that a right of re-entry is reserved to a lessor in the event of a breach of covenant does not preclude him from obtaining relief in equity against the commission of the breach, since he is not bound to adopt the remedy of re-entry provided in the lease, but may seek relief in an equitable forum.<sup>6</sup>

<sup>1</sup> *Ingram v. Morecraft*, 33 Beav., 49.

<sup>2</sup> *Tipping v. Eckersley*, 2 Kay & J., 264.

<sup>3</sup> *Foster v. Birmingham R. Co.*, 2 W. R., 378.

<sup>4</sup> *Selby v. Crystal Palace Gas Co.*, 30 Beav., 606.

<sup>5</sup> *Bird v. Lake*, 1 Hem. & M., 111.

<sup>6</sup> *Parker v. Whyte*, 32 L. J. Ch., 520; S. C., 1 Hem. & M., 167.

§ 1139. In all cases where a fixed sum of money is mentioned in the instrument as payable upon a breach of covenant, the question for determination is whether the sum named was intended as a penalty to secure the faithful performance of the covenant, or whether it was designed as an equivalent to be paid for the privilege of doing the act forbidden. And where the covenant is absolute in its terms, and the specified sum has been inserted as a penalty to insure the faithful performance of the obligations thereby imposed, the payment of the penalty will not deprive equity of its jurisdiction to restrain the commission of the forbidden act.<sup>1</sup> Upon the other hand, if it is manifest that the parties intended that the particular act might be done upon payment of the sum specified, the power to do the act upon payment of the money enters into and forms a part of the contract, and equity will neither interfere to prevent the doing of the act, nor to grant relief from the payment of the money agreed upon as an equivalent.<sup>2</sup> As illustrating this distinction, it is held that where a lessee of lands covenants not to burn over any portion of the premises demised, under the penalty of a certain fixed sum per acre, to be recovered as additional rent for every acre burned, he is not entitled to burn over the ground upon payment of the amount specified as liquidated damages, and the penalty does not deprive a court of equity of its jurisdiction to restrain the act.<sup>3</sup> But where the lessee covenants not to plow up pasture lands, or, if he does, that he will pay a certain sum for every acre plowed, an injunction will not be granted

<sup>1</sup> *Bird v. Lake*, 1 Hem. & M., 111; *Hardy v. Martin*, 1 Cox, 26; *Howard v. Hopkyns*, 2 Atk., 371; *Fox v. Scard*, 33 Beav., 327; *Sloman v. Walter*, 1 Bro. C. C., 418; *French v. Macale*, 2 Dr. & War., 269; S. C., 1 Con. & Law., 459; *Burne v. Madden*, Llo. & Goo. temp. Plunkett, 493; *Bray v. Fogarty*, 1 R. 4 Eq., 544; *Diamond Match Co. v. Roeber*, 106 N. Y., 473; *McCaull v. Braham*, 21 Blatch., 278. And see § 1175, *post*, and cases cited. See *Maxwell v. Mitchell*, 1 Ir. Eq., 359.

<sup>2</sup> *Ranger v. Great Western R. Co.*, 5 H. L., 94; *Street v. Rigby*, 6 Ves., 818. And see *Sainter v. Ferguson*, 1 Mac. & G., 286.

<sup>3</sup> *French v. Macale*, 2 Dr. & War., 269.

to restrain him from plowing, the relief being refused upon the ground that the parties have themselves fixed the damages and agreed upon the price to be paid for doing the act.<sup>1</sup>

§ 1140. It is to be observed, however, that the use of the terms "penalty" and "unliquidated damages" in the instrument is not necessarily conclusive as to the interpretation which shall be put upon it, and the sum so reserved may be held to be liquidated damages, although called a penalty in the covenant, and *vice versa*.<sup>2</sup> But where the covenant is in its nature a continuing one, and the sum specified as payable upon the breach is to be recovered in the reserved rent, it is regarded in equity as a penalty and not as liquidated damages.<sup>3</sup> But the fact that the sum specified in the lease as payable upon the breach of the covenant may be largely in excess of the real damage will not of itself render the sum so reserved a penalty, since it will be construed as an increased rent fixed by the parties to be paid during the remainder of the term.<sup>4</sup>

§ 1141. The question whether relief by injunction shall be granted against a breach of covenant is sometimes determined by the relation which the party aggrieved sustains to the premises, as whether he is actually in possession, with a right to the present enjoyment of the property, or whether his interest is that of a remainder-man or reversioner. And while the person seeking specific performance of a covenant, if actually in possession, is entitled to the protection of equity in the enjoyment of the property according to his covenant, yet if he be entitled only in remainder or reversion, some special damage by reason of the breach must be shown before a court of equity will interfere.<sup>5</sup> Thus, where

<sup>1</sup> Woodward v. Gyles, 2 Vern., 119; Rolfe v. Patterson, 2 Bro. P. C., 436.

<sup>2</sup> Gerrard v. O'Reilly, 3 Dr. & War., 414; S. C., 2 Con. & Law., 165; Bird v. Lake, 1 Hem. & M., 111.

<sup>3</sup> French v. Macale, 2 Dr. & War., 269; S. C., 1 Con. & Law., 459.

<sup>4</sup> Woodward v. Gyles, 2 Vern., 119.

<sup>5</sup> Johnstone v. Hall, 2 Kay & J., 414. See also McDaniel v. Callan, 75 Ala., 327.



premises are demised upon condition that they shall be used only for dwelling purposes, and that no trade or business of any nature shall be carried on upon the premises, the remainder-man, who files a bill for relief against a breach of the covenant, the tenant for life refusing to interfere, will not be allowed an injunction when he fails to show some special and material damage as the result of the infraction. But if the lessee were carrying on a grossly noxious or offensive trade, it would seem that relief might be allowed the remainder-man.<sup>1</sup>

§ 1142. Courts of equity, are frequently called upon to prevent by injunction the violation of negative covenants annexed to leases, and thus indirectly to enforce specific performance of the contract for the benefit of the lessor. Thus, where premises are leased under an express covenant on the part of the tenant that he will not convert meadow land, an injunction will be allowed to prevent him from breaking up meadow land for the purpose of building, the relief being granted expressly because of violation of covenant, and not upon the ground of waste.<sup>2</sup> So where there is a devise of realty to successive tenants for life with a restriction against mowing the premises, an injunction may be had to prevent mowing in violation of the restriction.<sup>3</sup> And where a lessee is, by the terms of his lease, restricted to a particular use of the demised premises, equity will restrain him from any other use of them, even though no irreparable injury be shown to result from such breach of covenant. The interference in such case is based upon the ground that, while there is a remedy at law for breach of the covenant on the part of the lessee, a new suit would have to be brought daily for each daily repetition of the offense, and an injunction is therefore necessary to prevent a multiplicity of suits, as well as on the ground of the great

<sup>1</sup> *Johnstone v. Hall*, 2 Kay & J., 414.

<sup>2</sup> *De Wilton v. Saxon*, 6 Ves., 106.

<sup>3</sup> *Blagrove v. Blagrove*, 1 DeG. & Sm., 252.

difficulty in estimating damages at law for such a grievance.<sup>1</sup>

<sup>1</sup>*Steward v. Winters*, 4 Sandf. Ch., 587; *Godfrey v. Black*, 39 Kan., 193; *Stees v. Kranz*, 32 Minn., 313; *Tod-Heatly v. Benham*, 40 Ch. D., 80; *Fetherstonhaugh v. Hagarty*, 3 L. R. Ir., 150. *Steward v. Winters*, 4 Sandf. Ch., 587, was a bill by a lessor to restrain his lessee from using the premises demised as an auction store, the lease containing a covenant that the store should be "occupied by the regular dry goods jobbing business, and for no other kind of business." A motion to dissolve the injunction was denied, Sandford, Vice Chancellor, observing as follows: \* \* \* "It is said that the remedy at law for damages is adequate, and that, so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown there can be no injury at all. I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land, selling or leasing it, may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. In the case of the bakery in *1 Vesey & Beames*, hereafter cited, I have no doubt a great many witnesses might have been found who would have testified that the bakery was

not an annoyance to them, or to any but over-sensitive persons. And in *Hills v. Miller*, 3 Paige, 254, the injury to the complainant, if tested by the opinions of witnesses, would scarcely have resulted in even nominal damages, in an action at law. It is not necessary that the act complained of should amount to a nuisance in law, either public or private. Nor is the court to enter into a comparison, and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former. (Per Lord Eldon, in *Macher v. The Foundling Hospital*, 1 Ves. & B., 188.) So far as the injury is concerned, it is therefore unnecessary for the complainant to establish that it will be irreparable, or on a continuing covenant that it will be substantially injurious. The question remains, is there an adequate remedy at law? In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harassing to both parties, and highly obnoxious to the censure of a court of equity. Then, if the suits were brought, how is it possible to estimate the actual damages? A jury might enter into a wide field of conjecture, without any certainty of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the de-

§ 1143. Illustrations of the doctrine as above discussed are various, but the governing principle underlying them all is substantially the same. Thus, where premises are leased under an express covenant not to carry on a business that will interfere with that of lessors upon their adjoining premises, upon pain of a forfeiture of the lease and payment of a penalty, defendants may be restrained from violating the covenant by carrying on the business, the relief being regarded as analogous to that by specific performance, and the jurisdiction being exercised upon the ground that the breach of the agreement would be a constantly recurring grievance.<sup>1</sup> And when the lease contains a covenant that the demised premises shall not be used for any purposes which may cause "annoyance, nuisance, grievance or damage" to the lessor, or to the inhabitants of the neighboring premises, the use of the premises as a hospital for the treatment of contagious diseases is such a breach of the covenant as to warrant an injunction.<sup>2</sup> So when a farm is leased, reserving to the landlord the right of hunting and taking game upon the premises, an unauthorized

leased premises would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced whose opinions would sanction a finding in either of these modes. I think that in a case where the parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious

or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although on the facts presented it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court, by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant."

<sup>1</sup> *Barret v. Blagrove*, 5 Ves., 555.

<sup>2</sup> *Tod-Heatly v. Benham*, 40 Ch. D., 80.

interference with such right by the lessee may be enjoined.<sup>1</sup> And when the proprietor of a hotel enters into a contract with a telegraph company, giving it the exclusive right to maintain a telegraph office in the hotel during the existence of the contract, he may be enjoined from permitting another company to establish a competing office in the hotel.<sup>2</sup> But unless the intention to restrict the enjoyment of the demised premises to a particular use clearly appears in the lease itself, or may be fairly implied from its terms, the lessee will not be enjoined from converting the property to other uses.<sup>3</sup> And where in a farm lease the tenant covenants that he will at all times during the tenancy keep a sufficient number of cattle and horses upon the farm, equity will not enjoin a breach of this covenant, since the granting of the relief would in effect require the court to superintend the operation of the farm during the entire term.<sup>4</sup> But if defendants have been allowed to continue their acts for a long period of years, without objection, complainants are estopped from relief in equity, and must seek a remedy at law.<sup>5</sup> It is held, however, that in such case no pretense of

<sup>1</sup> *Fetherstonhaugh v. Hagarty*, 3 L. R. Ir., 150.

<sup>2</sup> *Western Union T. Co. v. Rogers*, 42 N. J. Eq., 311.

<sup>3</sup> *Reed v. Lewis*, 74 Ind., 433.

<sup>4</sup> *Phipps v. Jackson*, 56 L. J. R. N. S. Ch., 550.

<sup>5</sup> *Barret v. Blagrove*, 6 Ves., 104. In the latter case the right to the injunction was based upon the claim by complainants that the business carried on by defendants came within the terms of the covenant. It appeared, however, that it had been carried on without interruption for more than ten years. Eldon, Lord Chancellor, said: "May not a very different question be made: whether if you have permitted this to go on for eleven years, you must not take your

chance at law? I have not the least doubt that what is stated in the affidavits is within the terms of the covenant; but the question is, whether you can have a specific performance under such circumstances, the parties having from the execution of the lease, eleven years ago, permitted that covenant to stand an ineffective part of the lease. I rather doubt whether, so far from the court's interfering at your instance, a bill might not be filed to prevent your suing at law upon that covenant. If there are equitable circumstances to prevent your taking your legal remedy, surely they will prevent your having a specific performance." And the injunction was accordingly dissolved. But see, *contra*, *Society*

title acquired by long continued enjoyment, on the part of the lessee, can avail him, if such enjoyment be adverse to the covenants of his lease.<sup>1</sup>

§ 1144. Upon similar principles the lessee of a mine, who has covenanted by the terms of his lease not to remove certain machinery from the mine, may be enjoined from violating his agreement.<sup>2</sup> And where the lessee has agreed not to carry on any trade or business upon the premises leased, an injunction will be allowed to prevent him from using the premises for school purposes.<sup>3</sup> Nor is the jurisdiction confined merely to restraining the original tenant from breach of covenant, but it may properly be exercised against a sub-lessee who has covenanted not to carry on a particular trade on the premises demised, even though such covenant appears only in the assignment of the lease and not in the original instrument.<sup>4</sup> So when it is covenanted in the lease that no intoxicating liquors shall be sold upon the premises, a sub-lessee may be restrained from violating such covenant.<sup>5</sup> And a covenant in a lease that a house shall be used only for the purposes of a dwelling house is held to be a covenant running with the land, and although the assignees of the lease are not mentioned in the covenant, an injunction will be granted to prevent a breach by an assignee of the lease and his sub-tenant.<sup>6</sup> So when premises are demised with a covenant in the lease that the lessee shall erect a house thereon fit for use by a private family and for no other purpose, under a given penalty as additional yearly rent, a violation of the covenant by a

*v. Low*, 2 C. E. Green, 19, where it is held that the covenant is a continuing covenant, running with the land, and its violation being of constant recurrence, the lessor's right to relief is not forfeited by long delay in making his application.

<sup>1</sup> *Society v. Low*, 2 C. E. Green, 19.

<sup>2</sup> *Hamilton v. Dunsford*, 6 Irish Ch., 412.

<sup>3</sup> *Kemp v. Sober*, 1 Sim. N. S., 520.

<sup>4</sup> *Clements v. Welles*, 1 L. R. Eq., 200. See also *Maunsell v. Hort*, L. R. 1 Ir. Ch. D., 88, affirming S. C., 1 R. 11 Eq., 478.

<sup>5</sup> *Steas v. Kranz*, 32 Minn., 313.

<sup>6</sup> *Wilkinson v. Rogers*, 12 W. R., 284.

sub-lessee, with notice, by converting the house so erected into a public house, will warrant an injunction against such breach of the covenant.<sup>1</sup> And where the lease contains a covenant by the lessee against permitting any auction sale to be held upon the premises, an injunction may be granted to prevent a breach of the agreement by a sub-lessee, even though he had no actual notice of the particular covenant in the original lease, when he might readily have acquired such information upon inquiry. Nor does the remedy of re-entry for condition broken, provided in the lease, bar relief in equity in such a case.<sup>2</sup>

§ 1145. It is also held that where a lessee covenants with his lessor that he will not carry on or suffer to be carried on or exercised upon the demised premises any trade or business, and that he will not suffer any act or thing which may be an annoyance, injury or inconvenience to the neighboring premises, the conducting of a hospital upon the premises is a breach of the covenant which constitutes sufficient ground for relief by injunction.<sup>3</sup> And where a lessee covenants not to permit any outward mark or show of business to be affixed to the premises, the inscribing defendant's name and business upon the blinds and upon a plate fastened upon the railing in front of the premises, constitutes such a breach of the covenant as to warrant an injunction. And to prevent relief by injunction in such a case upon the ground of acquiescence, defendant must show such a case of acquiescence as to forever preclude plaintiff from insisting upon his right under the agreement.<sup>4</sup>

§ 1146. To warrant the interference of equity against breaches of covenants limiting the use of demised premises, it is not requisite that the act complained of should amount to a nuisance in law, either public or private.<sup>5</sup> And per-

<sup>1</sup> *Bray v. Fogarty*, 1 R. 4 Eq., 544.

<sup>2</sup> *Parker v. Whyte*, 1 Hem. & M., 167; S. C., 32 L. J. Ch., 520.

<sup>3</sup> *Bramwell v. Lacy*, 10 Ch. D., 691.

<sup>4</sup> *Evans v. Davis*, 10 Ch. D., 747.

<sup>5</sup> *Steward v. Winters*, 4 Sandf. Ch., 587. And see *Macher v. Foundling Hospital*, 1 Ves. & B., 188.

mitting one trade to be carried on without objection will not raise an inference that the lessee may afterward carry on another, nor will the court in such case enter into a comparison as to which of several trades is more offensive than others.<sup>1</sup> And where a lessee covenants against using the premises as a shop or warehouse for any trade, without a written license, or permitting anything which might grow to the damage and inconvenience of lessors or any of their other tenants, a court of equity will not grant an injunction against entering judgment and issuing execution in ejectment for breaches of the covenants.<sup>2</sup> Where, however, a contract between lessor and lessee is so harsh and oppressive upon the lessee that equity ought not to give it effect, an injunction to restrain its violation will be refused.<sup>3</sup>

§ 1147. Relief by injunction may properly be extended in the class of cases under consideration upon the ground of fraud, even though the lease containing the restrictive covenants has been surrendered up and is no longer operative. For example, where a lessee who holds the premises under a lease containing a covenant not to build houses thereon, at less than a specified distance apart, sub-lets a portion of the premises, representing to the sub-lessee that he can not build except upon the conditions specified, and afterward surrenders the old lease and takes out a new one without such restrictions, and then proceeds to build in disregard of the conditions named, he may be enjoined from proceeding. In such case, although the covenant is destroyed by the surrender of the former lease, yet defendant having made such representations and induced action thereon, an appropriate case is presented for restraining him from proceeding in disregard of the specified conditions.<sup>4</sup>

§ 1148. It is also held, in case of the appointment of a receiver over premises which are held by the tenant under

<sup>1</sup> *Macher v. Foundling Hospital*,

1 Ves. & B., 188.

<sup>2</sup> *Macher v. Foundling Hospital*,

1 Ves. & B., 188.

<sup>3</sup> *Talbot v. Ford*, 13 Sim., 173.

<sup>4</sup> *Piggott v. Stratton*, 1 DeGex, F.

& J., 33, affirming S. C., Johns., 341.

a lease containing a covenant against the use of the demised premises for a particular purpose, as for a shop, upon pain of forfeiture of the lease, that the receiver is entitled to the aid of an injunction to restrain the tenant from using the premises for the prohibited purpose.<sup>1</sup>

§ 1149. It must, however, be borne in mind that when a restrictive covenant or prohibition of the general nature of those under discussion is inserted in a lease for the benefit of the lessors, to enable them to make the most of the property which they retain, and not for the benefit of the owners of adjacent property, such covenant will not inure to the benefit of another lessee of adjoining property from the same lessors; and such lessee is not, therefore, entitled to an injunction to restrain a breach of the covenant.<sup>2</sup>

§ 1150. The relief which is extended by courts of equity for the prevention of breaches of covenants or restrictions as between lessor and lessee is not limited to the protection of the lessor, but is freely extended in behalf of the lessee as well. Thus, where upon the execution of a lease the lessor agrees with his lessee that certain trees standing upon adjoining premises of the lessor shall not be cut down, a court of equity will protect the lessee by injunction against the cutting of the trees.<sup>3</sup> So where plaintiffs rent premises on which to erect a club house, upon an agreement by the lessors that a plot of ground adjacent thereto and under control of the lessors shall be laid out as an ornamental garden, and that no buildings shall be erected thereon, the lessors may be enjoined from erecting any buildings in violation of their agreement. And in such a case it would seem to be proper to grant the injunction in a form rendering it practically mandatory, as by restraining defendants from permitting such part of the buildings as they have already erected to remain.<sup>4</sup> So where a lessor had agreed with his lessee by parol that the latter should

<sup>1</sup> *Mason v. Mason, Flan. & K.*, 429.

<sup>3</sup> *Nicholson v. Rose*, 4 DeGex &

<sup>2</sup> *Master v. Hansard*, 4 Ch. D., J., 10.

718.

<sup>4</sup> *Rankin v. Huskisson*, 4 Sim., 18.



have the exclusive privilege of shooting game upon the premises during the tenancy, which agreement formed an essential part of the consideration or inducement for the tenant to take the premises, the lessor was enjoined from interfering with the tenant in his exercise of such right until defendant should execute a proper legal grant of the exclusive right to plaintiff.<sup>1</sup>

§ 1151. So, too, where plaintiff rents certain premises from defendants, with a covenant upon the part of the latter that plaintiff shall have the sole right of selling certain kinds of goods thereon during a given period, a violation of such agreement by permitting others to sell such goods affords sufficient ground for relief by injunction.<sup>2</sup> And upon similar principles, where the proprietors of a slaughter-yard lease to plaintiffs adjoining premises for the business of manufacturing fertilizers, and by the terms of such lease plaintiffs are given the exclusive right of taking refuse matter from the premises of lessors, the proprietors of the slaughter-yard may be enjoined from permitting persons other than plaintiffs to take away such refuse matter; and the injunction may be granted as against lessees of the original lessor, who have acquired their rights subsequent to plaintiffs' lease and with notice thereof. And in such a case relief by injunction is proper upon the ground of the inadequacy of the remedy at law, since redress at law could only be had by a continued series of suits throughout the duration of plaintiffs' term.<sup>3</sup>

§ 1152. One who has covenanted not to lease any house for hotel purposes, and not to lease any land within certain limits for the erection of a hotel, may be restrained from selling any land for such purpose, and from doing any act tending to the breach of his covenant.<sup>4</sup> Nor is it necessary that the covenant whose enforcement is sought should run

<sup>1</sup> *Frogley v. Earl of Lovelace*, John., 333.

<sup>2</sup> *Altman v. Royal Aquarium Society*, 3 Ch. D., 228.

<sup>3</sup> *Manhattan Manufacturing Co. v. New Jersey Stock Yard Co.*, 8 C. E. Green, 161.

<sup>4</sup> *Jay v. Richardson*, 30 Beav., 563.

with the land so as to be binding in law upon purchasers, since equity may restrain purchasers with notice of the covenant from doing any act in violation of its terms, although the covenant may not run with the land, so that no action at law could be maintained thereon against purchasers.<sup>1</sup> Thus, where one conveys a garden in fee, the grantee covenanting for himself and assigns that no buildings shall be erected upon the garden, a purchaser from the grantee with notice of such covenant will be restrained from violating it, regardless of whether he is bound by its terms at law.<sup>2</sup> And where land vested in trustees is sold in building lots, the conveyances containing certain restrictive covenants, it is held that each purchaser has an equity against the others to compel the faithful observance of the conditions.<sup>3</sup>

§ 1153. The aid of equity is frequently invoked to prevent the breach of covenants contained in conveyances of real estate. And it may be asserted as a general rule, that covenants prohibiting the purchaser from the erection of dwellings, or restricting him in the size or manner of erections, or the purposes for which the premises will be used, will be enforced in equity by restraining the purchaser or his assigns with notice, from their violation.<sup>4</sup> Thus, where

<sup>1</sup> *Tulk v. Moxhay*, 11 Beav., 571; *S. C.*, 2 Ph., 774; *Kirkpatrick v. Peshine*, 9 C. E. Green, 206; *Catt v. Tourle*, L. R. 4 Ch., 654.

<sup>2</sup> *Tulk v. Moxhay*, 11 Beav., 571; *S. C.*, 2 Ph., 774. "The question," observes Lord Cottenham in this case, "is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

<sup>3</sup> *Eastwood v. Lever*, 33 L. J. Ch., 357.

<sup>4</sup> *Seymour v. McDonald*, 4 Sandf.

Ch., 502; *Clark v. Martin*, 49 Pa. St., 289; *Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510; *Hodge v. Sloan*, 107 N. Y., 244; *Winnepesaukee Association v. Gordon*, 63 N. H., 505; *Sutton v. Head*, 86 Ky., 156; *Mann v. Stephens*, 15 Sim., 377; *Lattimer v. Livermore*, 72 N. Y., 174; *Haskell v. Wright*, 8 C. E. Green, 389; *Lord Manners v. Johnson*, 1 Ch. D., 673; *Gaskin v. Balls*, 13 Ch. D., 324; *Collins v. Castle*, 36 Ch. D., 243; *Kirkpatrick v. Peshine*, 9 C. E. Green, 206; *Stines v. Dorman*, 25 Ohio St., 580; *Loyd v. London, C. & D. R. Co.*, 2 DeGex, J. & S.,

one sells a lot adjoining his own premises, with a provision in the deed restricting the purchaser as to the size of the erections to be placed upon the premises, such a condition is regarded as for the benefit of the vendor, and subsequent purchasers of the property may be enjoined from violating the covenant.<sup>1</sup> And since the covenantee is entitled to the actual enjoyment of the property, *modo et forma*, as stipulated by the covenant, the threatened breach is ordinarily sufficient ground for the injunction, regardless of the extent of the injury or damage to the complainant.<sup>2</sup> But, while equity may properly restrain parties from erecting buildings higher than they are authorized to do by their act of incorporation, or by the terms of a contract, a small excess in height above that authorized will not constitute ground for an interlocutory injunction to prevent the use of the building after it has been erected, no irreparable injury being shown from such excess.<sup>3</sup>

§ 1154. The right to relief in cases of this nature is not limited to the original purchaser upon whom the conditions are imposed, but extends to his assigns who purchase with knowledge of the original covenants.<sup>4</sup> And where real estate is sold with covenants that no building shall be erected thereon, and it passes through the hands of successive purchasers, the final owner in fee, with notice of such covenants, may be restrained from violating them by the erection of buildings.<sup>5</sup> So where premises are conveyed with a covenant against using or permitting them to be used for the sale of spirituous liquors, and they are afterward sub-

568. See also *Bowes v. Law*, L. R. 9 Eq., 636.

<sup>1</sup> *Clark v. Martin*, 49 Pa. St., 289; *Lattimer v. Livermore*, 72 N. Y., 174.

<sup>2</sup> *Kirkpatrick v. Peshine*, 9 C. E. Green, 206.

<sup>3</sup> *Warden v. South Eastern R. Co.*, 9 Hare, 489.

<sup>4</sup> *Haskell v. Wright*, 8 C. E.

*Green*, 389; *Coles v. Sims*, 5 De Gex, M. & G., 1, affirming S. C., Kay, 56; *Watrous v. Allen*, 57 Mich., 362; *Hodge v. Sloan*, 107 N. Y., 244; *Winnepesaukee Association v. Gordon*, 63 N. H., 505.

<sup>5</sup> *Mann v. Stephens*, 15 Sim., 377. And see *Seymour v. McDonald*, 4 Sandf. Ch., 502.

let to a tenant from year to year, such sub-lessee may be enjoined from a violation of the covenant. And the relief may be granted although he had no actual knowledge of the original covenant, since he is bound by the terms of the original conveyance.<sup>1</sup> So under a similar covenant in a conveyance, a purchaser from the original grantee may be enjoined from selling liquor upon the premises, notwithstanding a condition in the conveyance that a breach of the covenant in question shall work a forfeiture of the estate.<sup>2</sup> And where plaintiff purchases a hotel, and in part payment therefor conveys to his grantor premises situated in the same town which were formerly used as a hotel, the conveyance containing a covenant that the premises thus conveyed by plaintiff shall not be used as a hotel or boarding-house by the grantee or his assigns so long as the property purchased by plaintiff shall be used for hotel purposes, a remote grantee may be restrained from using the premises so conveyed by plaintiff for hotel purposes.<sup>3</sup> So where the owner of land upon both sides of a river is engaged in operating a ferry across the river, and conveys land which constitutes his ferry landing upon one side of the river, with a condition in the deed that the grantee, his heirs or assigns shall not establish or authorize the establishment of a ferry landing upon the premises conveyed, without permission from the grantor, his heirs or assigns, such condition becomes operative upon a purchaser under the grantee, and he may be enjoined from its violation.<sup>4</sup>

§ 1155. As still further illustrating the doctrine under discussion, it is held that when a purchaser of land on which is situated a well covenants with his vendor, who retains adjoining lands intended to be sold for business purposes, to forever supply water from such well to all houses that may be erected upon the vendor's adjoining land, a violation of such covenant affords sufficient ground for an in-

<sup>1</sup> Feilden v. Slater, L. R. 7 Eq., 523.

<sup>3</sup> Stines v. Dorman, 25 Ohio St., 580.

<sup>2</sup> Watrous v. Allen, 57 Mich., 362.

<sup>4</sup> Frye v. Partridge, 82 Ill., 267.

junction.<sup>1</sup> And when, upon the sale of land, it is covenanted that the vendor shall have the exclusive right to supply all the ale and beer which shall be consumed in any building to be erected upon the premises, the covenant is of such a nature as to entitle the vendor to the aid of equity by injunction to restrain its violation.<sup>2</sup>

§ 1156. It sometimes becomes important to determine the meaning and extent of the term "adjoining," as used in covenants restricting the use of demised premises for the protection of neighboring owners or residents. And where a conveyance of land contains a covenant that the purchaser will not do or permit anything to be done upon the premises which shall be a nuisance to the owners or occupants of adjoining premises, and such purchaser afterward sells the land in different lots, the deed to each of his purchasers containing a similar covenant, the term "adjoining" is held applicable to the property adjacent to each lot, and not merely to the property adjoining the entire tract originally sold. The owner of such lots may, therefore, maintain a bill to restrain a breach of such covenant. But the erection of a school house upon one of the lots and the consequent inconvenience thereby resulting to the adjacent owners will not be regarded as such a nuisance as to justify an injunction.<sup>3</sup>

§ 1157. Where adjoining lots in the same block are from time to time sold to different purchasers, the conveyances of the lots containing mutual covenants between the grantor and the respective grantees against the erection of any noxious or offensive structure on the premises, and against carrying on any trade or business whatsoever which might be in anywise offensive to the neighboring inhabitants, the covenants in the deeds are regarded in equity as for the mutual benefit and protection of all the purchasers. And although a prior purchaser in such case might have no

<sup>1</sup> *Cooke v. Chilcott*, 3 Ch. D., 694.

<sup>3</sup> *Harrison v. Good*, L. R. 11 Eq., 388.

<sup>2</sup> *Catt v. Tourle*, L. R. 4 Ch., 654.

right of action at law upon a covenant in a deed to a subsequent purchaser, he is entitled to the aid of equity by injunction to restrain the carrying on of any noxious or offensive business, such as a coal yard, upon the lot of such subsequent purchaser. And upon demurrer to the bill, its allegations as to the noxious effects of coal dust upon adjoining residents, although highly wrought and expressed in ornate and poetical language, will not be regarded as a fiction, and the demurrer will be overruled.<sup>1</sup> Nor is it necessary that the restrictive covenant should be contained in the conveyance under which defendant claims, if it be contained in previous conveyances in the chain of title, since

<sup>1</sup>Barrow v. Richard, 8 Paige, 351, affirming S. C. *sub nom.* Barron v. Richard, 3 Edw. Ch., 102. "There can be no doubt," observes Walworth, Chancellor, "if the allegations in the bill are true, that the use of lots No. 12 and 13 as a coal yard is a clear violation of the covenants of the grantees of those lots. The language of the covenants shows that several other uses of the lots, far less offensive than this, are in terms prohibited on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little poetical, can not be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind into the premises of the neighboring inhabitants. And in spite of all their care, such coal dust and smut not only settles upon their walks and their grass-plats, but also on their fragrant plants and flowers, 'beclouding the brightness and

beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man.' But what must be still more offensive to the ladies of the neighborhood, 'this filthy coal dust settles upon their doorsteps, thresholds and windows, and enters into their dwellings, and into their carpets, their cups, their kneading troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of utility, of beauty, and of taste.' Making all due allowance for the coloring which the pleader has given to this naturally dark picture, it is perfectly certain that this keeping of a coal yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants. The Vice Chancellor was therefore right in overruling the demurrer. And the order appealed from is affirmed with costs."

if the easement is once created it accrues for the benefit of subsequent grantees. If, therefore, in such previous conveyances, restrictions have been inserted against nuisances or against the erection of a steam engine upon the premises conveyed, a subsequent grantee may be enjoined from erecting a steam engine, although no such restriction is contained in the immediate conveyance under which he derives his title.<sup>1</sup>

§ 1158. To warrant relief by injunction in the case of a covenant restricting erections upon the premises conveyed, it is not essential that the plaintiff should show any actual damage resulting from the breach of covenant of which he complains, and if a clear breach be shown equity may interpose its preventive aid regardless of the question of damage, since the covenantee is entitled to the benefit of his covenant. And in such a case, the purchaser having erected buildings beyond a line fixed by the covenant, it is proper to grant the injunction in a mandatory form.<sup>2</sup> So, too, the jurisdiction may be exercised to prevent the breach of negative covenants on the part of the vendor of real estate. Thus, where the vendor has covenanted in the conveyance not to erect or permit the erection of any buildings on his premises in front of those conveyed, the erection of buildings in violation of the terms of the agreement will be enjoined.<sup>3</sup> Where, however, the acts of the feoffor, or of those deriving their title under him, have so changed the character and condition of the adjoining lands, with reference to that conveyed, as to render the restriction in the conveyance inapplicable according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law.<sup>4</sup>

<sup>1</sup> *Birdsall v. Tiemann*, 12 How. Pr., 551.

<sup>2</sup> *Lord Manners v. Johnson*, 1 Ch. D., 673.

<sup>3</sup> *Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510.

<sup>4</sup> *Duke of Bedford v. Trustees of British Museum*, 2 Myl. & K., 552; S. C., 1 Coop. temp. Cottenham, 90; *Sayers v. Collyer*, 24 Ch. D., 180; *Duncan v. Central Passenger R. Co.*, 85 Ky., 525.

§ 1159. In considering applications for relief by injunction against the breach of restrictive covenants contained in conveyances of real property, the courts require due diligence upon the part of the plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will ordinarily defeat his application.<sup>1</sup> Indeed, equity requires the utmost diligence, in this class of cases, upon the part of him who invokes its preventive aid, and a slight degree of acquiescence is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant amounts, *pro tanto*, to a disaffirmance of the obligation. Where, therefore, plaintiff lies by for a period of four or five months, permitting defendants to go on with their erections in disregard of the covenant, he will be denied relief by injunction.<sup>2</sup> And where a vendor of real property takes from each of several purchasers a covenant that he will leave unbuilt a certain portion of the premises conveyed, he will not be permitted to enjoin a breach of this covenant by one of the purchasers when he has permitted prior purchasers to violate it without taking proceedings against them.<sup>3</sup> And, generally, whenever plaintiff stands idly by and permits the erection complained of to be made and expenses to be incurred therein, without objecting, his application for the aid of a court of equity comes too late and will not be entertained. Thus, where purchasers of real estate have bought upon condition that they are to use the land for a specific purpose and none other, they will not be restrained from using it for other purposes when plaintiff has permitted them to go on with-

<sup>1</sup> *Roper v. Williams*, Turn. & R., 18; *Peek v. Matthews*, L. R. 3 Eq., 515; *Water Lot Company v. Bucks*, 5 Ga., 315.

<sup>2</sup> *Roper v. Williams*, Turn. & R., 18.

<sup>3</sup> *Peek v. Matthews*, L. R. 3 Eq., 515. And the reason for the rule

as applied in this case is said to lie in the fact that the covenant is for the benefit of all the purchasers, and the vendor becomes a *quasi* trustee as to them to enforce the covenant as much against one as against the other.



out objection and to incur large expense in the work proposed, no sufficient excuse being shown for the delay in invoking the aid of equity.<sup>1</sup> But the doctrine of acquiescence, as applied to defeat the exercise of the jurisdiction in cases of this nature, is only considered with reference to the particular covenant the breach of which it is sought to enjoin, and the right to relief by injunction is not lost by plaintiff's acquiescence in the violation of another and distinct covenant in the conveyance.<sup>2</sup>

§ 1160. When the contract is one of hiring and service, with a covenant that plaintiff, so long as he continues to perform his part of the agreement, shall not be removed, the contract is not of such a nature as to warrant an injunction to prevent defendants from removing plaintiff and thereby enforcing the continuance of the relation between the parties.<sup>3</sup> If, however, in addition to the element of employment or agency stipulated in the agreement, there is added the furnishing of articles for sale, with a restriction against furnishing them to other persons, a different case is presented, and a breach of such a negative covenant may be prevented in equity. Thus, where defendant contracts to furnish plaintiff with a certain medical compound and to make him his sole wholesale agent therefor, and to furnish the article to no other persons save at a specified rate, a violation of the agreement constitutes sufficient ground for relief by injunction.<sup>4</sup> So defendant, who has contracted to sell certain chattels to plaintiff for a given time and at a given price, agreeing not to sell to any other person during such time, may be restrained from a breach of the agreement.<sup>5</sup>

§ 1161. It is also held that where a telegraph company

<sup>1</sup> *Water Lot Company v. Bucks*,  
5 Ga., 315.

<sup>2</sup> *Lattimer v. Livermore*, 72 N. Y.,  
174.

<sup>3</sup> *Stocker v. Brockelbank*, 3 Mac.  
& G., 250.

<sup>4</sup> *Dietrichsen v. Cabburn*, 2 Ph.,  
52; S. C., 1 Coop. temp. Cotten-  
ham, 72.

<sup>5</sup> *Donnell v. Bennett*, 22 Ch. D.,

is incorporated for the purpose of furnishing to its subscribers information as to the quotations of stocks and other commodities, the subscribers agreeing by the terms of their contract not to sell or give to other persons the reports and information thus received, such a subscriber may be enjoined from selling or giving away the information in violation of his agreement.<sup>1</sup>

§ 1162. Where an agreement is of such a nature that it is practically impossible for a court to enforce it, and the bill for an injunction is in effect a bill for specific performance, equity will not interfere. Thus, where the lessee of an inn has covenanted to keep it open as an inn during the period of his lease, and not to do any act whereby the license might become forfeited, an injunction will not be allowed to restrain him from discontinuing to use and keep open the premises as an inn, no intention being shown on the part of defendant to violate the negative part of the agreement, since this would in effect be a mandatory injunction directing him to carry on the business of an inn-keeper. And in such case, it not appearing that the lessee threatens or intends any act whereby the license might become forfeited, an interlocutory injunction, granted upon filing the bill, should be dissolved.<sup>2</sup> So where defendant had contracted to take notes of cases heard and determined in court and to publish them in the form of law reports for complainant, but had failed to comply with his agreement, an injunction was refused to prevent him from making reports for persons other than the complainant.<sup>3</sup> And where complainant had entered into an agreement with a railway company to conduct its road and to keep the rolling stock in repair, the court refused to enjoin the company from employing any other person than complainant to do the work contracted, upon the ground that it was impossible

<sup>1</sup> *Gold & Stock Telegraph Co. v. Todd*, 17 Hun, 548.

<sup>3</sup> *Clarke v. Price*, 2 Wilson Ch. C., 157.

<sup>2</sup> *Hooper v. Brodrick*, 11 Sim., 47.

from the nature of the agreement to enforce it specifically by compelling defendant to employ complainant.<sup>1</sup>

§ 1163. The rule as above laid down was formerly applied generally to all contracts for personal service, where from the nature of the case it was impossible to compel the contracting party to render the services. And while the result of the later authorities establishes a different doctrine, it was formerly held that, in cases of contracts for theatrical and operatic performances, a court of equity having no power to compel the performance of the acts required, would not interfere by injunction. And where complainant had agreed to sing in concerts and operas, and not to make other engagements during the period of the contract, an injunction was refused to prevent the contractor from making other engagements, the proper remedy being by proceedings at law for the violation of the contract.<sup>2</sup> So it has been held that, pending an action at law by a theatrical manager for damages resulting from the violation of a contract to play at plaintiff's theater for a given length of time, defendants will not be enjoined from playing elsewhere, nor will another manager be enjoined from contracting for their services.<sup>3</sup> And a theatrical manager has been denied an injunction to prevent an actor from playing at another theater, when by the terms of his contract he was not restricted from so doing.<sup>4</sup>

§ 1164. But the doctrine as above stated has been much shaken, if not wholly overthrown by other and better sustained authorities. And while in cases of contracts containing both affirmative and negative stipulations the authorities are exceedingly conflicting and irreconcilable, as to whether equity may interfere by injunction to prevent a breach of the negative covenant when the affirmative is of such a nature that it can not be specifically enforced by a

<sup>1</sup> *Johnson v. Shrewsbury R. Co.*,  
<sup>3</sup> *DeGex, M. & G.*, 914.

<sup>3</sup> *Burton v. Marshall*, 4 Gill, 487.

<sup>2</sup> *Sanquirico v. Benedetti*, 1 Barb.,  
315; *Burton v. Marshall*, 4 Gill, 487.

<sup>4</sup> *Caldwell v. Cline*, 8 Mart. N. S., 684.

judicial decree, yet the later and better considered doctrine is that equity may thus interfere to restrain the violation of the negative stipulation, although it can not specifically enforce the affirmative one.<sup>1</sup> For example, where defendant, an opera singer or actor, has contracted to sing or play for plaintiff at his theater, and not elsewhere without his permission, defendant may be enjoined from singing or acting elsewhere, the court thus preventing a breach of the negative covenant, although it can not specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff.<sup>2</sup> And the relief may be allowed, even though the contract of service or employment contains no negative or restrictive clause, if such negative element may be fairly presumed or implied. Thus, an actor who contracts with a theatrical manager to play for a given time at a particular theater may be enjoined from acting at any other theater during the period covered by such agreement, although he has not in terms contracted against acting elsewhere, since a contract to play at a particular theater

<sup>1</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG. & Sm., 485, overruling *Kemble v. Kean*, 6 Sim., 333; *Kimberley v. Jennings*, 6 Sim., 340; *Daly v. Smith*, 38 N. Y. Superior Ct., 158; *Western Union T. Co. v. Union Pacific R. Co.*, 1 McCrary, 558; *Donnell v. Bennett*, 22 Ch. D., 835. See, *contra*, *Hills v. Croll*, 2 Ph., 60; S. C., 1 Coop. t. Cottenham, 83.

<sup>2</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG. & Sm., 485; *Daly v. Smith*, 38 N. Y. Superior Court, 158; S. C., 49 How. Pr., 150; *McCaull v. Braham*, 21 Blatch., 278; S. C., 16 Fed. Rep., 37. In *Lumley v. Wagner*, 1 DeGex, M. & G., 604, Lord St. Leonards, Chancellor, after reviewing the authorities, says: "The present is a mixed case, con-

sisting not of two correlative acts to be done, one by the plaintiff and the other by the defendant, \* \* \* but of an act to be done by the defendant alone, to which is super-added a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract. \* \* \* The engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater."

for a specified time necessarily implies a negative against acting elsewhere during that period.<sup>1</sup>

§ 1165. If the negative and affirmative parts of the contract are entirely separate and distinct, the court may enjoin a breach of the negative covenant upon a bill seeking that relief only, regardless of the affirmative undertaking. Thus, where it is contracted with complainant that one of two persons shall not carry on the business of a tailor within a certain locality, the remaining portion of the contract being that the other of the two persons shall be employed by complainant in his business so long as it shall be carried on, upon a bill seeking only to restrain the breach of the negative stipulation, an injunction may be allowed.<sup>2</sup> In such case the negative agreement is entirely distinct and separable from the affirmative, there being in effect two distinct contracts, and relief is sought only against a violation of the negative stipulation.<sup>3</sup>

§ 1166. Where the contract, to restrain the violation of which an injunction is sought, is purely a negative contract, unconnected with any affirmative stipulations, relief may be properly granted, especially where the agreement is between partners and is for the benefit of the partnership business. Thus, where one of several partners in a theater covenants with the other partners that he will not write plays for any other theater, but does not agree to write for the theater belonging to the firm, he may be enjoined from violating such agreement.<sup>4</sup> And it is held that the jurisdiction to restrain the breach of a negative agreement, or a promise to abstain from doing a particular thing, is not limited to cases where the court has jurisdiction over the acts of complainant.<sup>5</sup> Nor is it material whether the right

<sup>1</sup> *Montague v. Flockton*, L. R. 16 Eq., 189; *Webster v. Dillon*, 3 Jur. N. S., 432.

<sup>2</sup> *Rolfe v. Rolfe*, 15 Sim., 88; S. C., 1 Coop. t. Cottenham, 87.

<sup>3</sup> See also *Hopner v. Brodripp*, 1 Coop. t. Cottenham, 89.

<sup>4</sup> *Morris v. Colman*, 18 Ves., 437.

<sup>5</sup> *Dietrichsen v. Cabburn*, 2 Ph., 52.

sought to be protected is at law, or under an agreement which can not otherwise be brought within the jurisdiction of equity, provided the bill states a right in the person complaining to the performance of a negative agreement of the defendant.<sup>1</sup>

<sup>1</sup> *Dietrichsen v. Cabburn*, 2 Ph., 52.

## IV. CONTRACTS IN RESTRAINT OF TRADE.

- § 1167. General rule.  
1168. Grounds of the jurisdiction; illustrations.  
1169. Restrictive covenant not implied.  
1170. Written contract not necessary.  
1171. Sale of printing establishment; corporation enjoined.  
1172. Manner of resuming business immaterial.  
1173. Illustrations of the relief.  
1174. Relief in cases of unlimited restriction.  
1175. Liquidated damages.  
1176. Resuming business in employ of third person.  
1177. Acting as manager for another.  
1178. Contract must be certain and violation clear.  
1179. Consideration; interest.  
1180. What must be shown by bill.  
1181. Covenants against publication.  
1182. Plaintiff not allowed both injunction and damages.  
1183. Assignee of notes for purchase money, when enjoined.  
1183*a*. Exclusive agreement between city and water company protected.

§ 1167. The extent to which courts of equity may interfere by injunction to restrain the breach of contracts in total or partial restraint of trade has given rise to not a little conflict of authority. The law upon this subject may be said to have undergone three distinct stages of transition or development. The earlier doctrine of the English courts regarded all contracts restricting one in the exercise of his trade or profession as contrary to public policy and void, whether the restriction was total or partial. The second or intermediate stage was that in which the courts, while still holding contracts in general restraint of trade to be void, yet recognized the validity of such agreements when the restraint was only partial, being limited as to the conditions of time and space, reasonable in its nature and founded upon sufficient consideration; and in such cases relief by injunction has been freely granted to prevent a breach of the undertaking.<sup>1</sup> The third and what may be

<sup>1</sup> *Butler v. Burleson*, 16 Vt., 176; *Whittaker v. Howe*, 3 Beav., 383; *McClurg's Appeal*, 58 Pa. St., 51; *Morris v. Colman*, 18 Ves., 437;

termed the existing state of the law as deduced from the latest English and American authorities is that which recognizes and enforces covenants of this nature, even though the restraint is general throughout an entire state or country, provided it is founded upon a sufficient consideration and is not unreasonable in view of the nature and extent of the business of the covenantee. Disregarding the reasons for the stringency of the early English doctrine, which had its origin in the insular condition of that country and in the limited extent of business transactions, the present tendency of the courts is to construe and to enforce such contracts with reference to the wider scope and area of business enterprises as extended by the agencies of steam and electricity in modern times. If, therefore, the restrictive covenant is no broader than the nature and necessities of the business in question and affords no more than a reasonable protection to the covenantee, the courts now freely extend relief by injunction, even though in many cases the covenant is not limited in area.<sup>1</sup>

§ 1168. The jurisdiction in cases of this nature is based upon the ground that the parties can not be placed *in statu quo*, and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of courts of law. Where the

Rolfe v. Rolfe, 15 Sim., 88; S. C., 1 Coop. t. Cottenham, 87; Nicholls v. Stretton, 7 Beav., 42; Hubbard v. Miller, 27 Mich., 15; Beal v. Chase, 31 Mich., 490; Baumgarten v. Broadway, 77 N. C., 8; Williams v. Williams, 2 Swanst., 253; Baker v. Pottmeyer, 75 Ind., 451; Smith's Appeal, 113 Pa. St., 579; Gill v. Ferris, 82 Mo., 156; Bailey v. Collins, 59 N. H., 459; Richardson v. Peacock, 33 N. J. Eq., 597; Finger v. Hahn, 42 N. J. Eq., 606; Brewer v. Lamar, 69 Ga., 656. And see Oregon S. N. Co. v. Winsor, 20 Wal., 64.

<sup>1</sup> Whittaker v. Howe, 3 Beav., 383; Ainsworth v. Bentley, 14 Weekly Rep., 630; Hagg v. Darley, 47 L. J. R. N. S. Ch., 567; Leather Cloth Co. v. Lorisont, 39 L. J. N. S. Eq., 86; Rousillon v. Rousillon, 14 Ch. D., 351; Morse T. D. & M. Co. v. Morse, 103 Mass., 73; Mackinnon Pen Co. v. Fountain Ink Co., 48 N. Y. Superior Court, 442; Diamond Match Co. v. Roeber, 106 N. Y., 473. See, *contra*, Allsopp v. Wheatcroft, 42 L. J. N. S. Ch., 12; Berlin Machine Works v. Perry, 71 Wis., 495. And see Albright v. Teas, 37 N. J. Eq., 171.



restrictive covenant is limited both as to time and territory, the courts have almost uniformly enforced the restriction, and most of the reported cases will be found to fall within this class, although, as will be seen, the relief is now freely granted where no territorial limits are prescribed. As illustrating the former class of cases it is held that contracts between physicians, whereby one is restricted from the exercise of his profession within a prescribed area, upon sufficient consideration, as for example a sale of the goodwill of the business, will be enforced by enjoining any attempt at the exercise of the profession within the locality specified.<sup>1</sup> And where defendant, on being articted as a clerk to complainant, who was an attorney at law, covenanted that he would not interfere with complainant's clients, or act for them in the capacity of attorney, he was restrained from a breach of his covenant.<sup>2</sup> So where part-

<sup>1</sup> McClurg's Appeal, 58 Pa. St., 51; *Ligare v. Semple*, 32 Mich., 462; *Butler v. Burleson*, 16 Vt., 176. In the latter case, the following observations of the court very clearly illustrate the grounds upon which the interference is based: "When there is an express covenant and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it can not be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day; and furthermore, the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms." Injunction sustained.

<sup>2</sup> *Nicholls v. Stretton*, 7 Beav., 42. This was a case where defendant,

on being articted as a clerk to complainant, an attorney, covenanted that he would not in any way interfere with or be concerned as attorney, or otherwise, for any of complainant's clients or correspondents, upon pain of forfeiting the sum of one hundred pounds for every breach of the covenant. The defendant, having acted as attorney for certain parties who had been clients of complainant, a bill was filed praying a perpetual injunction against such intermeddling in violation of the terms of the agreement. Lord Langdale, Master of the Rolls, although conceding that the enforcement of the terms of a negative contract might possibly work injury to third parties in such a case, sustained the jurisdiction as follows: "In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluc-

ners were engaged in the business of running coaches between two different points, and defendant sold his interest in the business to plaintiff, with a condition that he would not at any time run a coach between the points, or in any manner injure plaintiff's business, an interlocutory injunction was allowed to prevent a violation of the covenant.<sup>1</sup> So where defendant sold to plaintiff a medicinal compound, agreeing never to use or to permit his name to be used on any preparation which could be sold for the same purpose, a violation of the agreement was held to warrant an injunction.<sup>2</sup> Where, however, the restriction was unlimited as to time, as where one was employed as an assistant by a physician and surgeon, agreeing in consideration of such employment that he would never engage in the practice of medicine or surgery in the same city, an injunction was refused to restrain a breach of the contract, since it imposed an unreasonable restriction upon defendant in excess of that which was necessary for the protection of plaintiff.<sup>3</sup>

tance in acting, for not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen not only in the case of solicitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted not to be employed for certain persons, and those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this court can not interfere in these cases without the possibility of injury to third parties. That difficulty, however, has been passed over, and the court has repeatedly exercised its jurisdiction in cases of this nature. It is no answer to say, in this case, that the client would not

have employed the plaintiff in the particular case referred to. Any interference with his clients was one of the very things which the plaintiff, when he took the defendant into his office, was desirous of guarding against. I do not see any ground on which I can say that this is a contract which this court will not enforce. The perseverance of Stretton in acting in this manner and in availing himself of the introduction he accidentally acquired in the plaintiff's office has made this application necessary. I must grant this injunction; the only question is, as to the terms in which it should be expressed."

<sup>1</sup> *Williams v. Williams*, 2 Swanst., 253.

<sup>2</sup> *Brewer v. Lamar*, 69 Ga., 656.

<sup>3</sup> *Mandeville v. Harman*, 42 N. J. Eq., 185.

And where a physician purchases the office and good-will of another, the vendor agreeing not to resume practice in the same city, a breach of the agreement will not be restrained when it is not shown that plaintiff has sustained any injury.<sup>1</sup>

§ 1169. Some conflict of authority exists upon the question whether, in the absence of an express agreement against resuming business in a given locality upon the sale of a business with its good-will, equity should interfere by injunction to prevent defendant from so resuming. The better doctrine, however, is that to warrant a court of equity in interfering by injunction in such cases, there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good-will of a trade or business not to carry on the same trade in that locality. It follows, therefore, that where one has sold the good-will of his trade, without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it.<sup>2</sup> And where upon

<sup>1</sup>Downey v. Lee, 86 Ind., 260. And see this case as to adequacy of consideration for such an agreement.

<sup>2</sup>Cruttwell v. Lye, 17 Ves., 335; Shackle v. Baker, 14 Ves., 468; Kennedy v. Lee, 3 Meriv., 441; Churton v. Douglas, Johns., 174. And see Bradford v. Peckham, 9 R. I., 250; Stephens v. Aulls, 3 Thomp. & C., 781. See, *contra*, Dwight v. Hamilton, 113 Mass., 175; Ginesi v. Cooper, 14 Ch. D., 596. In Kennedy v. Lee, 3 Meriv., 441, Lord Eldon was of opinion that upon a contract of sale by one partner to another, in the absence of any express or negative agreement or prohibition, the purchaser seeking an injunction and a receiver was not entitled "to claim any good-will in the trade in addi-

tion to the partnership property which is the subject of it, except what is the necessary effect of his acquiring the sole ownership in the property — certainly not such as to preclude the defendant from carrying on the same trade where, and when, and with whom he pleases." So in Churton v. Douglas, Johns., 174, Vice Chancellor Wood observes, p. 187: "The authorities, I think, are conclusive upon this point, that the sale of the good-will of a business, without more, does not imply a contract on the part of the vendor not to set up again a similar business himself. I use the expression similar business purposely, in order to distinguish the case I am supposing from one where, as here, the vendor seeks to set up again the identical business

the evidence it is doubtful whether the parties at the time of the sale had any distinct agreement or understanding that defendant should not resume the same business in opposition to plaintiff at the same place or within a given distance therefrom, it was held that the contract sought to be established was not of such a nature as to be aided by any intendment, and that the bill seeking to enjoin defendant from carrying on the business within the given limits should be dismissed, but without prejudice to plaintiff's right to sue at law.<sup>1</sup> So where defendants had sold a millinery business to plaintiff, who insisted upon a covenant that they would not carry on or permit another person to carry on the same business within a given locality for ten years, and would do their best to procure customers for plaintiff and to assist him, but defendants declined to give such covenant, which was then waived by plaintiff upon the mere undertaking of defendants, upon a bill seeking an injunction upon the ground that defendants were encouraging another person to undertake a rival business and recommending customers to such person, an interlocutory injunction was refused before answer to restrain proceedings at law under a judgment recovered, leaving the parties to their remedy at law for damages.<sup>2</sup> So when the contract of sale provides that the vendor shall be at liberty to engage in the same business, if he shall see fit, he will not be enjoined from

which he has professed to sell. Upon the sale of the good-will of a business, the vendor is not precluded from carrying on a precisely similar business with all the advantages he may be able to acquire from his own industry and labor, and from the regard people may have for him; and that in a place next door, for example, to the very place where the former business was carried on. And upon the authorities it is settled that if the purchaser wishes to prevent that

step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed."

<sup>1</sup> *Stephens v. Aulls*, 3 *Thomp. & C.*, 781.

<sup>2</sup> *Shackle v. Baker*, 14 *Ves.*, 468. "I can not," says Lord Eldon, "see my way to grant an injunction in this case. If it had been nothing more than a purchase of the good-will of this trade, the vendor would be at liberty to set up the same trade in any other situation."

soliciting the customers of the old firm.<sup>1</sup> And where one sells the good-will of a business he is not, in the absence of express contract, prevented from leasing premises which he may own in the same neighborhood to another person who may carry on the same business, provided there is no collusion between the parties and the lessor has no interest in the business. Equity will not, therefore, under such circumstances, interfere by injunction to prevent such lessee from conducting the business.<sup>2</sup> In Massachusetts, however, it is held that upon the sale of a business and good-will there is an implied covenant, as in other sales, that the vendor will do nothing to disturb the vendee in the possession of his purchase. And where a physician sold to another his real estate, practice and the good-will of his business, it was held that an injunction would lie to prevent the vendor from resuming practice as a physician in the same town.<sup>3</sup>

§ 1170. It is not necessary, however, that the contract should be in writing to entitle it to the protection of equity, and where one has sold the lease of a house with the good-will of the business connected therewith, and has agreed orally that he will not renew the business in that street, he may be enjoined from violating such oral agreement.<sup>4</sup> So where plaintiff, a teacher, is induced to purchase of defendant, also a teacher, the lease of an academy upon the representations of the latter that he will quit the business of teaching, defendant may be enjoined from opening another school in that locality, since there can be no adequate remedy at law for the injury thus sustained.<sup>5</sup> Nor is it necessary that the contract should contain any express limitation as to the place or extent of territory over which the restric-

<sup>1</sup> *Pearson v. Pearson*, 27 Ch. D., 198. See, as to the effect of a parol agreement not to engage in a rival business in the same city, made contemporaneously with the execution of a written lease, *Welz v. Rhodius*, 87 Ind., 1.

<sup>2</sup> *Bradford v. Peckham*, 9 R. L., 250.

<sup>3</sup> *Dwight v. Hamilton*, 113 Mass., 175.

<sup>4</sup> *Harrison v. Gardner*, 2 Madd.,

<sup>5</sup> *Spier v. Lambdin*, 45 Ga., 319.

tion shall extend; and if from all the circumstances of the case it is manifest that it was the intention of the parties that it should be limited to the town in which the business had been previously carried on, the contract will be so construed, and equity will enjoin defendant from continuing the business in that locality.<sup>1</sup>

§ 1171. Where one had sold a printing establishment and business, with the copyright of a valuable receipt book published by him, together with the good-will of the business and the right to the vendee to use the vendor's name therein, and had covenanted not to resume the business within the state while vendee should continue therein at the place in question, an injunction was granted to restrain the vendor from engaging directly or indirectly in the printing business in the state and from printing such receipt book. And the vendor having formed a corporation for the purpose of conducting his new business, and the other incorporators having been advised of such contract, the corporation was also enjoined from conducting the business with or for the vendor.<sup>2</sup>

§ 1172. The manner in which the vendor carries on the business in violation of his covenant is immaterial, provided it be in fact the business which he has contracted not to resume. And when defendant sells his business and good-will to plaintiff, covenanting that he will not within a given time resume the business at a specified place, if under the pretense of selling upon commission for other parties he engages in a business which is within the spirit of the covenant, a fitting case is presented for extending the aid of an injunction.<sup>3</sup>

§ 1173. Where one sells his premises, together with the fixtures and good-will of his business, and as part of the consideration for the purchase of the good-will he covenants not to carry on the business at a specified place, the

<sup>1</sup> Hubbard v. Miller, 27 Mich., 15. Green, 40; S. C., 28 N. J. Eq., 151,

<sup>2</sup> Beal v. Chase, 31 Mich., 490. 33 N. J. Eq., 597.

<sup>3</sup> Richardson v. Peacock, 11 C. E.

purchaser agreeing to employ him, he may be enjoined from setting up business in violation of his covenant, even though he has been discharged from the purchaser's employ and the evidence does not clearly show that he was properly dismissed.<sup>1</sup> And the fact that defendant is employed upon a salary by a third person conducting the business prohibited by the contract will not prevent the granting of relief by injunction.<sup>2</sup> Thus, where a tailor, upon the sale of his business, good-will and fixtures, covenants not to carry on or be interested or concerned in the same business within an area of five miles from the former location, he will be enjoined from working as a journeyman upon a salary, in the employ of a nephew of the same name and conducting the same business, within a quarter of a mile of the old location.<sup>3</sup>

§ 1174. It remains to consider the later modification of the general doctrine under discussion, as shown in the more recent cases in which relief by injunction has been granted against the breach of covenants in restraint of trade, although the restriction may have extended over an entire country, or even been unlimited as to territorial extent. The governing principle in this class of cases is, that, although contracts in restraint of trade may be bad upon grounds of public policy, unless they are natural and reasonable for the protection of the parties dealing with the subject-matter of the contract, and although public policy requires that the citizen should not deprive himself or the state of his skill or talent, yet one who has a commodity to sell should be permitted to sell it most advantageously in the market by precluding himself from entering into any competition with the purchaser. And the restriction against future competition, however unlimited as to territory, may be upheld and enforced if no broader than is

<sup>1</sup> *Daggett v. Ryman*, 17 L. T. N. S., 408; *Finger v. Hahn*, 42 N. J. S., 486. Eq., 606.

<sup>2</sup> *Newling v. Dobell*, 19 L. T. N. S., 408. <sup>3</sup> *Newling v. Dobell*, 19 L. T. N. S., 408.

necessary to afford reasonable protection to the business of the covenantee. Thus, where the owner of letters patent for the manufacture of a valuable article of commerce sells his patents to a company incorporated for carrying on the manufacture of the article, and covenants not to carry on or allow to be carried on in any part of Europe any manufacture or sale of productions similar to those which were the subject of the patents, and not to communicate to any one the processes of the manufacture in such a manner as to interfere with the exclusive enjoyment of the benefits purchased, the covenant is one capable of being enforced in equity, and its breach will be prevented by injunction.<sup>1</sup> So an attorney and solicitor, who sells his busi-

<sup>1</sup> *Leather Cloth Company v. Lonsont*, 39 L. J. N. S. Eq., 86. The principles underlying the jurisdiction of equity for the protection of contracts in restraint of trade are clearly stated in this case by James, Vice Chancellor, as follows: \* \* \* "The truth is that all the cases, when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties dealing legally with some subject-matter of contract, and that the principle is this: public policy requires that every man should be at liberty to work for himself, and should not be at liberty to deprive himself or the state of his labor, skill or talent by any contract that he enters into. On the other hand, public policy requires this: that where a man has by skill or any other means obtained something which he wants to sell, he should be able to sell it in the most advantageous way in

the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser, that then the same public policy which enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract. Now in this case the subject-matter of the contract was a particular manufacture, carried on partly under patents and partly by processes which were known to the vendors, and it is to be assumed not known except to the vendors themselves and their agents and workmen. That being the subject-matter of the contract, the stipulation is that the vendor will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture



ness to a new firm, covenanting for a valuable consideration that he will not resume practice within a period of twenty

anywhere so as to interfere with the exclusive enjoyment by the intended company of the benefits thereby agreed to be purchased. It seems to me that the case much more resembles, having regard to these facts, the sale of a secret (which has been held to be perfectly good), and as connected with the sale of that secret an unlimited stipulation as to time or place as to communicating the secret or dealing with it so as to interfere with the purchaser, because in truth there were particular processes for the manufacture; those processes were to be communicated, and they were to be communicated for the exclusive benefit of the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else; that he should not communicate that secret anywhere under any circumstances in any part of the world to anybody. But how would it be possible to enforce such a covenant as that not to communicate the process, if he were at the same time to be at liberty to carry on that same trade with the same processes in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? Therefore, the mere fact that he is entitled to restrain himself simply amounts to this: it is not that he is restrained, but that he is entitled to restrain himself from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process entitles him also to restrain himself from carrying on a manufacture which would involve the communication of the process. Therefore, independently of those words, 'so as in any way to interfere with the exclusive enjoyment,' I am of opinion that there is nothing in this covenant which violates the rules of law or which is in contravention of the decided cases, when the principles upon which these cases have been decided come to be properly considered. But if there were anything in the covenant so standing which might be supposed to be in contravention of some of the decided cases, I am satisfied myself that those words, 'so as in any way to interfere with the exclusive enjoyment of the company,' do properly and sufficiently modify and qualify it; the principle being that you are not to have any more restraint than is necessary for the benefit of the company, and in order to obviate any objection you must not do it so as to interfere; that is for the company to say; we do not ask for any unreasonable restraint, for any capricious restraint upon you; we only ask you to tie yourself up not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. Therefore, I am of opinion that the plaintiffs are right in saying that the covenant is one capable of being enforced in this court. Then the next question is, has the de-

years in any part of the country, and will not induce any of the clients of the old firm to withhold their business from the new, may be enjoined from violating the agreement.<sup>1</sup> And where the defendant, upon selling his business, covenants with the purchaser, its successors and assigns, that he will not within ninety-nine years engage in the same business within any of the several states and territories of the United States, excepting Nevada and Montana, a breach of the covenant may be enjoined, the covenant affording a reasonable protection to plaintiff coextensive with its business.<sup>2</sup> So a covenant by an employee of plaintiff,

Lorsont, been doing anything which is in violation of that covenant? I am of the opinion that he is doing so; that he is engaged in a manufactory for the manufacture of productions similar to those which were the subject of letters patent, and which were then manufactured in the manufactory so carried on at West Ham at the time of the contract; that is to say, it was proved to me that the particular production is the production of an article known as Crockett's leather cloth; that Crockett's leather cloth was manufactured at West Ham at that time; that Crockett's leather cloth, called by that very name, is manufactured by the defendant and sold by him under that very name, with an advertisement from him to the effect that the goods supplied by him are in every respect similar to those made by the Crockett International Leather Cloth Company while the works were 'under my management,' and then he states his sixteen years experience, and so on. That is to say, having covenanted that he would not be engaged in the manufacture of prod-

ucts similar to those which were then being made, he circulates to the world a letter saying: 'I am now actually making productions which are in every respect similar to those which were made by the vendors and afterward made by the purchaser.' I am of opinion, therefore, that the plaintiffs are entitled to an injunction. The injunction, I think, ought to be in these words, the only evidence given before me being with regard to Crockett's leather cloth: 'To restrain the defendant from carrying on any manufactory for the production of Crockett's leather cloth, or being engaged in any company for the sale of Crockett's leather cloth, or any production similar thereto, and from in any manner holding himself out as the manufacturer of such Crockett's leather cloth, or any production similar thereto.' This is the whole extent to which I purpose granting the injunction."

<sup>1</sup> Whittaker v. Howe, 3 Beav., 383.

<sup>2</sup> Diamond Match Co. v. Roeber, 106 N. Y., 473. And see the opinion of the court in this case for

iffs who were wine merchants, not to engage in the wine business for a given period after leaving their employ, was sustained and its breach was enjoined, although the restriction was unlimited territorially and the injunction in effect prevented defendant from resuming the business throughout Great Britain and the continent of Europe.<sup>1</sup> And relief by injunction, in this class of cases, is freely granted for the protection of purchasers who have succeeded to the rights of the original covenantor.<sup>2</sup>

§ 1175. Contracts of the class under consideration frequently contain stipulations that, in the event of a breach of the undertaking not to resume the given trade or business, a fixed sum may be recovered as liquidated damages; and it has sometimes been urged that covenants of this nature were a bar to relief by injunction in equity, and that redress should be had by an action at law to recover the stipulated damages. The test, however, to be applied in

an exhaustive review of the entire subject, with the reasons for the relaxation of the earlier English doctrine. Much of the uncertainty and want of harmony in the reported cases will be found to be the result of a *dictum* of Chief Justice Parker, afterward Lord Macclesfield, in *Mitchel v. Reynolds*, 1 P. Wms., 181, in which the court pronounce all contracts in general restraint of trade void, although the case was one of partial restraint, the restriction being confined to a single parish in London and although the validity of the contract was sustained.

<sup>1</sup>*Rousillon v. Rousillon*, 14 Ch. D., 351. Says Mr. Justice Fry in this case, p. 356: "The question of extent is really a question of reasonableness, and the reasonableness must vary with the facility of the means of communication. If a trade is carried on over a wide

extent, either through a whole country, or through a whole continent, there is nothing unreasonable in the restraint being equally extensive." And in *Morse T. D. & M. Co. v. Morse*, 103 Mass., 73; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Superior Court, 442; *Hagg v. Darley*, 47 L. J. R. N. S. Ch., 567, the contracts were upheld and the right to enjoin their breach was sustained, although the restriction was unlimited as to territory, the courts regarding the protection sought as not unreasonable in view of the extent and necessities of the business of the plaintiffs. But see, *contra*, *Allsopp v. Wheatcroft*, 42 L. J. N. S. Ch., 12; *Berlin Machine Works v. Perry*, 71 Wis., 495.

<sup>2</sup>*Diamond Match Co. v. Roeber*, 106 N. Y., 473; *Morgan v. Perhamus*, 36 Ohio St., 517.

all such cases seems to be that of the intention of the parties, and if it is apparent from the contract as an entirety that the restriction against resuming the business in question was not intended to be satisfied by the payment of the sum named as liquidated damages, equity may still enjoin a breach of the agreement. In other words, if it is apparent from the contract that the intention of the parties was, not that immunity from the restriction might be purchased by payment of the penalty, but that they only intended to liquidate the damages in the event of a breach of the undertaking, relief by injunction may still be properly allowed.<sup>1</sup>

§ 1176. A merchant who, upon selling his stock in trade and business, covenants not to carry on the same business at the same place, or within certain limits surrounding, and who thereupon gives up his place of business, will not be enjoined from afterward soliciting and procuring orders within the specified territory, the question of whether this constitutes a breach of the covenant being regarded as too doubtful to warrant an injunction without bringing an action.<sup>2</sup> And where one undertakes the management of the business of a chemist, covenanting against carrying on the same business in his own name and for his own benefit, or in the name and for the benefit of any other person, within a certain radius, under a specified penalty secured by bond, and he afterward solicits orders for another chemist within the limits specified, the effect of such conduct upon the covenant in question is regarded as too doubtful to warrant a preliminary injunction.<sup>3</sup> So where one sells his business, agreeing not to carry it on in the same place, either in his own name or in the name of other persons, for a period of five years, and during this period he acts as manager for

<sup>1</sup> Howard v. Woodward, 10 Jur. N. S., 1123; Diamond Match Co. v. Roeber, 106 N. Y., 473; National Provincial Bank v. Marshall, 40 Ch. D., 112; London & Yorkshire Bank v. Pritt, 56 L. J. R. N. S. Ch., 987. See also § 1139, *ante*, and

cases cited. But see, *contra*, Stanford v. Shortreed, 62 Iowa, 524.

<sup>2</sup> Turner v. Evans, 2 DeGex, M. & G., 740.

<sup>3</sup> Clark v. Watkins, 9 Jur. N. S., 142.

another person engaged in the same business and in the same place, the question is regarded as too doubtful to be dealt with on an application for an interlocutory injunction.<sup>1</sup> And a covenant against engaging in a certain trade, or in any matter pertaining thereto, within a certain district, is not regarded as violated by loaning money to one engaged in such business, the loan being secured by mortgage upon the business premises, even though the covenantor may know that the mortgagor's only means of repaying the money is out of the profits of the business.<sup>2</sup>

§ 1177. Where, however, one agrees that he will not directly or indirectly, either alone or in partnership with or with the assistance of any other person, set up or follow or practice a particular business, he is regarded as violating his covenant by conducting the business in the capacity of assistant or manager to another person.<sup>3</sup> So where defendant demises to plaintiff a shop and covenants that he will not at any time during the term carry on or be concerned in carrying on, either directly or indirectly, a particular business within a given distance from the town, the acting as manager for another in conducting the particular trade is such a violation of the covenant as to warrant an injunction.<sup>4</sup>

§ 1178. While it is thus apparent that the jurisdiction of equity is well established to prevent by injunction the violation of a covenant, made upon sufficient consideration, not to engage in a particular business within a given locality, yet the contract itself must be certain and distinct, or such as from the surrounding circumstances may be construed with certainty. And an agreement by defendants to "never tow vessels in competition" with plaintiffs is not sufficiently definite or certain to warrant an injunction against its violation.<sup>5</sup> The alleged violation of the contract must also be clear and well established, and when the

<sup>1</sup> *Allen v. Taylor*, 18 W. R., 888;  
S. C., 22 L. T. N. S., 651.

<sup>2</sup> *Bird v. Lake*, 1 Hem. & M. 338.

<sup>3</sup> *Dales v. Weaber*, 18 W. R., 993.

<sup>4</sup> *Jones v. Heavens*, 4 Ch. D., 636.

<sup>5</sup> *Caswell v. Gibbs*, 33 Mich., 331.

question of violation is involved in doubt, and no injury is shown to have been done to plaintiff which can not be compensated in damages, the court will refuse to interfere.<sup>1</sup> So where a business is carried on for a term of years by a receiver, a purchaser of the business can not enjoin such receiver from soliciting orders from and doing business with the customers, in the absence of any contract imposing such a restriction.<sup>2</sup>

§ 1179. It is also to be borne in mind with reference to the exercise of the jurisdiction under discussion, that relief by injunction is allowed only when there is a sufficient consideration for the contract, and when the plaintiff himself has a legal interest in the contract. Where, therefore, a member of an incorporated company sells his stock, with a covenant not to carry on the business in which the corporation is engaged for a specified time and within a given locality, the corporation will not be allowed to enjoin a violation of the contract, the consideration for the sale not having come from the corporation and it not being a party to the contract.<sup>3</sup>

§ 1180. When defendant upon the sale of his business contracts as part of the consideration that he will not resume the same business in the same town, without the purchaser's consent, and the purchaser seeks to enjoin an alleged violation of the contract, the injunction will not be allowed when the bill does not show a continuance or repetition of the alleged breach of the contract, and when it does not appear that plaintiffs at the time of commencing suit were themselves in the business in question.<sup>4</sup> Plaintiff must also show a full compliance on his part with the terms of the contract, and failing to show this an injunction will be refused.<sup>5</sup>

<sup>1</sup> Harkinson's Appeal, 78 Pa. St., 196.

<sup>2</sup> *In re Irish*, 40 Ch. D., 49.

<sup>3</sup> *Onondaga Co. Milk Association v. Wall*, 17 Hun, 494.

<sup>4</sup> *Berger v. Armstrong*, 41 Iowa, 447.

<sup>5</sup> *Hollis v. Shaffer*, 38 Kan., 492.

§ 1181. A covenant on the part of a publisher that he will not publish in future a particular magazine is considered in the same light as a covenant by one selling a particular trade or business, that he will not again engage in that trade or business, and is not void as a general contract in restraint of trade. But the injunction in such case will be confined to restricting the publication of the particular magazine specified.<sup>1</sup> And it is to be observed that the jurisdiction in restraint of breaches of negative contracts is not confined to the contracting parties, but may be extended to third parties with notice of the covenant. Thus, where an author assigns the copyright of a work published in his name, covenanting not to publish any work prejudicial to the sale of the first, a publisher who, with notice of such covenant, afterward publishes a work from the same author, in the same name and upon the same subject, will be enjoined, although the latter work may not be an actual piracy, and although it is published under a different title.<sup>2</sup> But where plaintiff and defendant are partners in the publication of a journal, and defendant, the retiring partner, sells his interest to plaintiff, covenanting not to be connected with any newspaper or publication of that kind within the limits of a particular county so long as plaintiff shall own or control an interest in the journal in question, the acts of plaintiff in representing by printed circulars and by verbal statements that he has sold his interest and has no further connection with the journal, or with its management, will operate as an estoppel to prevent him from enjoining the publication by defendant of a similar paper.<sup>3</sup>

§ 1182. One who is aggrieved by the violation of a contract in restraint of trade of the nature under consideration will not be allowed both legal and equitable relief at the same time. And where a motion for an injunction to restrain the breach of such an agreement is ordered to stand

<sup>1</sup> *Ainsworth v. Bentley*, 14 W. R., 630.      <sup>3</sup> *Talcott v. Brackett*, 5 Bradw., 60.

<sup>2</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90; S. C., 2 Sim. & St., 1.

over, with leave to complainant to proceed at law, and he recovers liquidated damages in an action at law, he will not be allowed an injunction to restrain the further breach of the agreement.<sup>1</sup> Upon similar principles, where an action at law is instituted to recover a penalty as liquidated damages for the violation of a covenant made by a surgeon not to resume practice within a certain district, an injunction will not at the same time be granted to prevent him from practicing in such district.<sup>2</sup> And if, after obtaining an injunction against the breach of an agreement, the party aggrieved brings an action at law for damages, the injunction may be dissolved on the application of defendant.<sup>3</sup>

§ 1183. Where two joint owners or partners dissolve, and the retiring partner sells his interest and the good-will of the business to the other, taking notes for the purchase money secured by mortgage upon the property sold, and agreeing not to engage in the same business at that place for a given length of time, or if he does so engage, that he will pay the purchaser a specified sum, greater than the amount of the notes, as liquidated damages, and will allow the same to be set off against the notes, a violation of the agreement by resuming the business is regarded as sufficient ground for enjoining an assignee of the notes from prosecuting an action to obtain possession of the property mortgaged as security for such purchase money.<sup>4</sup>

§ 1183 *a*. Where a city, having full authority for so doing, has contracted with a water company for a supply of water, covenanting not to grant to any other persons the right to lay pipes and to supply the city or its inhabitants, upon the faith of which agreement the company has made large expenditures in the construction and operation of its works, the city may be enjoined from violating its covenant by granting like privileges to others.<sup>5</sup>

<sup>1</sup> *Sainter v. Ferguson*, 1 Mac. & G., 286.

<sup>3</sup> *Fox v. Scard*, 33 Beav., 327.

<sup>4</sup> *Spicer v. Hoop*, 51 Ind., 365.

<sup>2</sup> *Carnes v. Nesbett*, 7 H. & N., 158; *Mayall v. Higbey*, 1 H. & C., 148.

<sup>5</sup> *Atlantic City W. W. Co. v. Atlantic City*, 39 N. J. Eq., 367.



## CHAPTER XX.

### OF INJUNCTIONS PERTAINING TO PRIVATE CORPORATIONS.

I. GOVERNING PRINCIPLES . . . . .	§ 1184
II. INJUNCTIONS IN BEHALF OF SHAREHOLDERS . . . . .	1203
III. ULTRA VIRES . . . . .	1224
IV. CORPORATE ELECTIONS . . . . .	1230

#### GOVERNING PRINCIPLES.

- § 1184. Jurisdiction founded in trust; fraud, averments of.
- 1185. Jurisdiction cautiously exercised.
- 1186. Discretion of corporate bodies rarely interfered with.
- 1187. Continuing trespass ground for relief.
- 1188. Questions concerning chartered rights not considered in equity.
- 1189. Restraint of banking corporations purely statutory.
- 1190. Dividends by foreign corporation; illegal stock.
- 1191. Joinder of parties.
- 1192. Diversion of funds from corporate purposes.
- 1193. Election to membership.
- 1194. Disciplining members.
- 1195. Rights of creditors.
- 1196. When creditors enjoined from suing insolvent corporations.
- 1197. Insolvent corporations.
- 1198. When corporation enjoined from dissolution.
- 1199. Misconduct of directors.
- 1200. Gross abuse of powers enjoined.
- 1201. President enjoined from levying execution.
- 1202. National bank not enjoined from loaning on negotiable paper.
- 1202 *a*. Market quotations; board of trade; telegraph companies.

§ 1184. The jurisdiction of equity to control or restrain the operations of corporate bodies, while exercised upon the same general principles which govern in other cases, may not inappropriately be considered as a branch of the general jurisdiction of courts of equity over the subject of trusts. And unless a breach of trust can be satisfactorily established, an injunction will rarely be allowed to restrain

the application of corporate property or funds to other than corporate purposes.<sup>1</sup> Where, however, the existence of a trust is established, or corporate property is affected by a trust, equity will interfere for its enforcement and for the protection of the rights of members of the corporation.<sup>2</sup> And the right of any member of a corporate body to invoke the aid of equity to prevent a breach of trust by the majority of the members may be regarded as well established.<sup>3</sup> To warrant a court of equity in interfering with the proceedings of an incorporated company in the construction of its works two things must concur: first, it must appear that the company is transcending its charter; and second, that the interposition of equity is necessary to prevent an injury which can not be adequately compensated in damages at law.<sup>4</sup> And while fraud constitutes strong ground for invoking the aid of equity in restraint of the action of corporate bodies, relief by injunction will not be allowed upon mere general averments in the bill of complainant's belief of collusive and corrupt conduct. It must either appear from the bill itself that the proceedings sought to be enjoined are void, or particular acts of fraud or *prima facie* evidence of collusion must be shown and must be positively sworn to.<sup>5</sup>

§ 1185. Especial caution is observed by courts of equity in granting injunctions whose effect would be to interfere with or suspend the operations of important public works which are being carried on by corporations. The power of granting injunctions being one of the extraordinary

<sup>1</sup> *Evan v. Avon*, 29 Beav., 144; *Attorney-General v. Carmarthen*, Cooper, 30.

<sup>2</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31; *Dummer v. Chippenham*, 14 Ves., 245; *Attorney-General v. Mayor*, 1 Bligh N. S., 312.

<sup>3</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31.

<sup>4</sup> *James River Co. v. Anderson*,

12 Leigh, 278; *Gartside v. East St. Louis*, 43 Ill., 47. As to the right to enjoin a telegraph company from condemning a right of way over and upon a bridge crossing a navigable river, see *Chicago & A. B. Co. v. Pacific M. T. Co.*, 36 Kan., 113; *Pacific M. T. Co. v. Chicago & A. B. Co.*, 36 Kan., 118.

<sup>5</sup> *Champlin v. Mayor*, 3 Paige, 573.

powers of equity, its improper exercise in cases of public works would be productive of serious injury. The jurisdiction in such cases should therefore be exercised only for the prevention of irreparable mischief, or where the injury complained of is so great and the risk so imminent that no prudent man would think of incurring it.<sup>1</sup> And equity will not interfere by injunction with the statutory powers of a corporation, such as a canal company, at the suit of an adjacent property owner who has sustained no injury which can not be otherwise redressed.<sup>2</sup> Nor should the court interfere where the right of the party complaining is doubtful, or where an action at law or in chancery, prosecuted in the ordinary mode, will afford adequate redress.<sup>3</sup> And an injunction to restrain the operations of a large company or corporation should rarely be granted without notice, on account of the mischief which might otherwise ensue. It is held, however, that a court of equity may properly exercise its discretion in such cases, and the fact that the writ has been allowed without notice is not of itself sufficient to warrant a dissolution, even though the chancellor might have exercised the discretion differently from the master who granted the injunction.<sup>4</sup>

§ 1186. Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers, to whom such powers are confided.<sup>5</sup> And it is a well established principle of equity, that where acts requiring the exercise of judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed, nor will such officers be enjoined, except when

<sup>1</sup> *Stewart v. Little Miami R. Co.*, 14 Ohio, 353.

<sup>2</sup> *Ware v. Regents Canal Co.*, 8 DeGex & J., 212.

<sup>3</sup> *Stewart v. Little Miami R. Co.*, 14 Ohio, 353.

<sup>4</sup> *Ross v. Elizabeth R. Co.*, 1 Green Ch., 422; *Capner v. Flemington Mining Co.*, 2 Green Ch., 467; *Perkins v. Collins*, *Ib.*, 482.

<sup>5</sup> *Attorney-General v. Foundling Hospital*, 4 Bro. C. C., 165.

abusing their power to the injury of others.<sup>1</sup> Thus, equity will not interfere by injunction with the discretionary power of a board of canal commissioners in regulating the quantity of water necessary for canal purposes, upon the complaint of persons claiming an interest in the water.<sup>2</sup> Complainants in such case, through whose land the canal passes, have no such vested right as authorizes them to interfere with the discretionary power reposed in the proper officers.<sup>3</sup> And in a controverted question as to the expediency of the location of a railway, where the decision has been confided to the professional judgment and skill of the officers of the corporation, equity will not restrain them in the exercise of that discretion, upon the application of a person not otherwise affected or injured than by the actual location passing through his land.<sup>4</sup> It is to be observed, however, that the discretion of all public agents, especially in the appropriation of private property for public uses, must be brought to the test of legal judgment, and equity may enjoin when in the exercise of that discretion such public agents overstep the conditions necessary for the public welfare.<sup>5</sup>

§ 1187. Where a corporation of a *quasi* public nature, as a canal company, is about to do a permanent injury to private property, under the pretext of improving its works, the act, although a trespass in its nature, being a continuous one, will warrant the interposition of equity. Under such circumstances the trespass itself is aggravated by the abuse of authority by the officers and agents of the corporation, under color of their office, and such official oppression affords strong ground for the exercise of the extraordinary power of equity through the writ of injunction.<sup>6</sup>

<sup>1</sup> Walker v. Mad River R. Co., 8 Ohio, 38; Cooper v. Williams, 4 Ohio, 253.

<sup>2</sup> Cooper v. Williams, 4 Ohio, 253.

<sup>3</sup> Id.

<sup>4</sup> Walker v. Mad River R. Co., 8 Ohio, 38.

<sup>5</sup> Cooper v. Williams, 4 Ohio, 253.

<sup>6</sup> Ryan v. Brown, 18 Mich., 212. And see Osborn v. United States Bank, 9 Wheat., 738.

Nor in such case will a court of equity require so strong a showing of irreparable injury before granting the relief as is required to justify an injunction against private persons.<sup>1</sup>

§ 1188. In connection with the general subject of the interference of equity to restrain the abuse of corporate powers, it is to be observed that questions concerning the possession or forfeiture of chartered rights belong exclusively to courts of law, and are not cognizable in equity. Hence an injunction will not be allowed against the operations of a banking corporation on the ground that its affairs are being so conducted as to work a forfeiture of its chartered rights.<sup>2</sup> And upon a bill to enjoin a railway company from proceedings to condemn land for its right of way, a court of equity will not consider questions relating to the fraudulent organization of the corporation, and such alleged frauds afford no ground for an injunction in such case; since if there has been an abuse or misuser of the corporate franchise, it can only be taken advantage of in a direct proceeding by the state for that purpose, and can not be inquired into in a proceeding for an injunction.<sup>3</sup> Nor is the exercise of banking privileges, without authority, a nuisance which calls for the restraining power of a court of equity, even though it is alleged that the bank is insolvent, and is buying up its own paper at a discount.<sup>4</sup>

§ 1189. The jurisdiction of equity in restraining the operations of banking institutions is purely statutory, and no warrant for its exercise is found in the general equity powers of the court.<sup>5</sup> And where the insolvency of a banking corporation is relied upon as the ground for enjoining

<sup>1</sup> *Ryan v. Brown*, 18 Mich., 212.

<sup>2</sup> *Attorney-General v. Bank of Niagara*, Hopk. Ch., 354.

<sup>3</sup> *New Central Coal Co. v. Georges Creek Coal & Iron Co.*, 37 Md., 537; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq., 755, reversing *S. C. sub nom. Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq., 475;

*West Jersey R. Co. v. Cape May & S. L. R. Co.*, 34 N. J. Eq., 164. See also *Shippen v. Paul*, 34 N. J. Eq., 314.

<sup>4</sup> *Attorney-General v. Bank of Niagara*, Hopk. Ch., 354.

<sup>5</sup> *Attorney-General v. Bank of Michigan*, Harring. (Mich.), 315.

its operations, mere affidavits on information and belief are not sufficient to warrant an injunction, especially when they are directly contradictory to the regular, official reports of the bank, made under oath and published according to law. Nor is the court at liberty to infer insolvency and to issue an injunction from the mere fact of the suspension of specie payments by such bank.<sup>1</sup>

§ 1190. The directors of a foreign corporation will not be enjoined from payment of a dividend at the suit of one to whom no debt is due from the corporation, whose only ground for the injunction is a supposed error on the part of the directors in making the dividend. In such a case, complainant will be left to his redress in the state in which the company was incorporated.<sup>2</sup> But where the directors of a company incorporated in two different states have made issues of stock which are illegal and void, they may be restrained from using the proceeds of the sale of such stock until both the states in which the company was incorporated have ratified the issue alleged to be illegal and void. But the injunction in such a case will only be allowed to stand as to the illegal issue, and dealings in the genuine stock will not be enjoined, nor will the general business of the company be interfered with.<sup>3</sup> And an injunction restraining the use of the proceeds of sale of new stock issued by the directors of a foreign corporation will not be continued when both of the states in which the com-

<sup>1</sup> *Livingston v. Bank of New York*, 26 Barb., 304. But it is held in Missouri, under the statutes of the state regulating the subject of insurance, that a court of equity may entertain an action instituted by the superintendent of the insurance department of the state to enjoin a life insurance company from doing business and to wind up its affairs, when it has re-insured its risks and ceased to take new ones. *Price v. St. Louis Mutual Life In-*

*surance Co.*, 3 Mo. App., 262. And as to the right to an injunction to restrain an insurance company from doing business under the laws of New Jersey, when its capital is impaired, see *Streit v. Citizens Fire Insurance Co.*, 29 N. J. Eq. (2 Stew.), 21.

<sup>2</sup> *Howell v. Chicago & N. W. R. Co.*, 51 Barb., 378.

<sup>3</sup> *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb., 513.

pany was incorporated have recognized the validity of the issue of the stock against which the writ was directed.<sup>1</sup> And although an officer of an incorporated company, who has made illegal and unauthorized issues of stock to himself, may be enjoined from transferring such stock to a third person, the relief will be allowed only upon a proper showing of the illegality of the issues and of the proposed transfer.<sup>2</sup>

§ 1191. Where the court may properly exercise its jurisdiction, a defect in the joinder of parties may sometimes prove an effectual bar to granting the relief. Thus, where a bill charges unlawful and improper conduct on the part of a corporation, but prays an injunction against the president, directors and agents, without asking that the writ issue against the corporation itself, such omission is fatal if insisted upon by defendant.<sup>3</sup> But where an injunction is sought against a corporation to prevent a fraudulent sale of corporate property to one who is not made a party to the action, such non-joinder is not demurrable.<sup>4</sup>

§ 1192. Equity will enjoin any improper diversion of corporate funds for other than corporate purposes, and will restrain the managers of a company from engaging in any enterprise not contemplated by the articles of incorporation.<sup>5</sup> The jurisdiction extends even further; and where an incorporated company ceases to prosecute the work for which it was created, and attempts to misapply its funds, or attempts any radical change in the character of the enterprise in which it is engaged, it may be enjoined from collecting the obligations given to support the original undertaking.<sup>6</sup> Where, however, the principal object of the bill is the appointment of a receiver for the management

<sup>1</sup> *O'Brien v. Chicago, R. I. & P. R. Co.*, 53 Barb., 568.

<sup>2</sup> *Sherman v. Clark*, 4 Nev., 138.

<sup>3</sup> *Binney's Case*, 2 Bland, 99.

<sup>4</sup> *Abbot v. American Hard Rubber Co.*, 4 Blatch., 489.

<sup>5</sup> *Kean v. Johnson*, 1 Stockt., 401; *Smith v. Bangs*, 15 Ill., 399;

*Sears v. Hotchkiss*, 25 Conn., 171.

<sup>6</sup> *Illinois v. Cook*, 29 Ill., 237.

of the affairs of a railway corporation, the directors and officers of the company will not be enjoined from acting in their official capacity; where such restraint is not necessary for the accomplishment of the principal object of the bill.<sup>1</sup>

§ 1193. A court of equity will not interfere by injunction with election to membership in a private corporation, upon a bill by a member of the corporation alleging that the election complained of would injure plaintiff and deprive him of his legal rights and privileges as a member, and would deprive him of his rightful voice in the management of the property and affairs of the corporation. An injunction is not regarded as an appropriate remedy for such grievances, especially when a remedy is provided by statute by a summary application to a court of law.<sup>2</sup>

§ 1194. The power which is usually exercised by corporations of expelling, disciplining or disfranchising their members for misconduct is regarded as of a *quasi* judicial nature, with which equity will not ordinarily interfere while the corporate authorities are acting within the scope of their powers. Where, therefore, members of a medical association or corporation are being tried for alleged misconduct, contrary to their duty as corporators, a court of equity will not interfere by injunction with the act of the corporation, such interference being regarded as not within the jurisdiction of equity.<sup>3</sup> So where a member of an incorporated association is suspended from membership in accordance with the rules and by-laws of the association to which all its members subscribe, equity will not entertain jurisdiction to restrain the enforcement of such suspension.<sup>4</sup> And an injunction being a preventive remedy, it will not lie to undo what has already been done. It will not, there-

<sup>1</sup> *Stevens v. Davison*, 18 Grat., 819.

<sup>2</sup> *Thompson v. Society of Tammany*, 17 Hun, 305.

<sup>3</sup> *Gregg v. Massachusetts Medical Society*, 111 Mass., 185.

<sup>4</sup> *Rorke v. Russell*, 2 Lans., 244; *Pitcher v. Board of Trade*, 121 Ill., 412.



fore, be used for the purpose of restoring to membership in a private corporation, such as a board of trade, a member who has been expelled by the action of the corporation.<sup>1</sup> It is also held that where a trustee in an incorporated company is removed from his office for non-attendance, pursuant to a power conferred by the charter, long acquiescence in such removal affords sufficient ground for refusing relief by a preliminary injunction to restrain the board from preventing him from acting as such trustee.<sup>2</sup> Nor will equity enjoin a corporation from inquiring into the conduct of one of its officers and members and investigating charges against him with a view to his removal, the corporation having full power to make such investigation and removal.<sup>3</sup> But a member of a club may be protected by injunction in his rights of membership, when the proceedings for his expulsion have been had without proper notice or hearing, and not in accordance with the rules of the club.<sup>4</sup>

§ 1195. When a corporation is being voluntarily wound up under a statute providing that all creditors shall be paid *pari passu*, equity will not permit one creditor to obtain an advantage over the others by proceedings at law, and will restrain him from proceeding by execution for the recovery of his debt, his judgment having been recovered upon the same day with the confirmation of the proceedings for winding up the company.<sup>5</sup> But where the property of a defunct corporation has passed into the hands of its directors as trustees for the creditors, such trustees will not be permitted to enjoin a judgment creditor from satisfying his judgment out of the property, when they have delayed for a number of years to apply the property in payment of

<sup>1</sup> *Fisher v. Board of Trade of Chicago*, 80 Ill., 85; *Baxter v. Same*, 83 Ill., 146; *Pitcher v. Board of Trade*, 121 Ill., 412.

<sup>2</sup> *Van Ranst v. New York College*, 4 Hun, 620.

<sup>3</sup> *O'Grady v. Governors*, 19 L. R. Ir., 350.

<sup>4</sup> *Labouchere v. Earl of Wharncliffe*, 13 Ch. D., 346; *Fisher v. Keane*, 11 Ch. D., 353; S. C., 49 L. J. R. N. S. Ch., 11.

<sup>5</sup> *In re Sabloniere Hotel Co., L. R.* 3 Eq., 74.

such debt, and when it is not shown that there are other creditors whose rights should be protected.<sup>1</sup> So in proceedings in equity for the voluntary dissolution of a corporation under the statutes of a state, the court will not interfere by injunction with the rights of judgment creditors, whose judgments were obtained in good faith and by the use of due diligence before the proceedings for dissolution were instituted.<sup>2</sup> And upon the presentation of an application for the voluntary dissolution of a corporation it is improper to enjoin the creditors from enforcing their demands *in limine*, and at the same time with the rule to show cause why the dissolution should not be had.<sup>3</sup>

§ 1196. When a corporation has passed into the hands of a receiver appointed by a court of equity to wind up its affairs, the decree dissolving the corporation and directing the distribution of its assets is regarded as in the nature of a judgment for all the creditors, and they are subject to the summary jurisdiction of the court in matters pertaining to the administration of the estate of the insolvent corporation. They may, therefore, be enjoined from prosecuting suits against the company by motion in the suit in which the receiver was appointed, and without the bringing of a new suit for that purpose.<sup>4</sup>

§ 1197. Upon a bill filed by persons insured in an insurance and loan association against its directors and managers, showing gross mismanagement and waste of the trust funds out of which the insured were to be paid, and it appearing that there was danger of the remaining funds being wasted and plaintiffs being deprived of all remedy in the premises, the case was regarded as a proper one for an injunction and a receiver, the relief being based upon the ground of a breach of trust.<sup>5</sup> And upon the appointment

<sup>1</sup> *Good v. Sherman*, 37 Tex., 660.

<sup>2</sup> *In re Waterbury*, 8 Paige, 380.

<sup>3</sup> *In re French Manufacturing Co.*, 12 Hun, 488.

<sup>4</sup> *Attorney-General v. Guardian Mutual Life Insurance Co.*, 77 N.

Y., 272. See also *Woerishoffer v. North River C. Co.*, 99 N. Y., 398.

<sup>5</sup> *Evans v. Coventry*, 5 DeGex, M. & G., 911, reversing S. C., 3 Drew., 75.

of a receiver of all the property and effects of a corporation for the purpose of winding up its affairs, it is proper in connection with such appointment and as a part of the order to enjoin the directors and officers from collecting any debts or demands due to the corporation, and from transferring or incumbering any of its property or effects, the injunction, in such case, being regarded as an appropriate adjunct of the receivership.<sup>1</sup>

§ 1198. Where the purpose of the action is to fix the liability of the defendant corporation to plaintiff for profits received under certain contracts, and the corporation has attempted to procure its own dissolution, it may be enjoined from taking any proceedings for a dissolution, or for the appointment of a receiver, or for the distribution of its effects among its shareholders, and from making any transfer of its effects.<sup>2</sup>

§ 1199. The directors of a company organized for the improvement of highways under the laws of a state may be enjoined from paying out any money upon contracts made with their own members, since a director of a corporation can not be permitted to contract with himself; and the relief, in such case, will be granted at the suit of tax payers whose taxes would be affected by such payment.<sup>3</sup> But a court of equity will not lend its aid by injunction in behalf of the directors of an insurance company, constituted by deed, to restrain alleged misconduct upon the part of another director, when plaintiffs have failed to avail themselves of the powers of regulation given them by such deed.<sup>4</sup> Nor can the attorney-general of a state, in behalf of and in the name of the people, maintain an action to restrain the prosecution of suits growing out of controversies and disputes among different claimants to the management and directorship of a railway corporation, or to restrain certain

<sup>1</sup> *Morgan v. New York & Albany R. Co.*, 10 Paige, 290.

<sup>3</sup> *Port v. Russell*, 36 Ind., 60.

<sup>4</sup> *Ellison v. Bignold*, 2 Jac. & W..

<sup>2</sup> *Fisk v. Union Pacific R. Co.*, 10 Blatch., 518.

directors from acting as such, since equity will not interfere in behalf of the public with the litigation of private parties, however numerous the parties or bitter the controversy.<sup>1</sup>

§ 1200. Corporations may be restrained from any gross abuse of their powers resulting in injury to individuals, since equity will not permit corporate bodies, with whom it is always difficult to deal upon equal terms, to take, under color of authority, proceedings of doubtful legality, if by so doing they place those against whom their proceedings are directed in a position of peril, from which it would be difficult to extricate themselves.<sup>2</sup> And when the charter of a water company limits its charges to consumers, but the company seeks to exact higher rates, a consumer may enjoin the company from cutting off his supply for refusal to comply with its illegal demands.<sup>3</sup>

§ 1201. The president of a corporation, who purchases a small indebtedness against it, may be enjoined from levying an execution for payment of a balance due upon such indebtedness, when he has already taken valuable property of the corporation in part payment, the relief being allowed in such case upon the ground that the president is a trustee for the corporation.<sup>4</sup>

§ 1202. A court of equity will not enjoin a bank which is organized and operating under the national banking act from making loans upon negotiable paper secured by stocks and bonds of marketable value as collateral, such loans being plainly within the powers of national banks.<sup>5</sup>

<sup>1</sup> *People v. Albany & S. R. Co.*, 5 Lans., 25, reversing S. C., 1 Lans., 308, 55 Barb., 344, 38 How. Pr., 228. As to the right of one of two

incorporated companies owning and using a cemetery in common to enjoin the other from preventing the use by plaintiff of such cemetery, see *Ladies Benevolent Society*

*v. Benevolent Society*, 2 Tenn. Ch., 77.

<sup>2</sup> *Mayor v. Groshon*, 30 Md., 436.

<sup>3</sup> *Levy v. New Orleans W. Co.*, 38 La. An., 25; *Ernst v. New Orleans W. Co.*, 39 La. An., 550.

<sup>4</sup> *Brewster v. Stratman*, 4 Mo. App., 41.

<sup>5</sup> *Shoemaker v. National Mechanics Bank*, 1 Hughes, 101.

§ 1202 *a*. When a corporation, such as a board of trade or commercial exchange, has so conducted its business for many years as to create a standard market for agricultural products, and, in connection with telegraph companies admitted to the floor of the exchange, has established a system for the instantaneous transmission of market quotations and reports to such an extent that the business has become affected with a public interest, such companies will not be permitted to make any unjust discrimination as to the persons to whom such quotations shall be furnished. And a bill will lie to restrain defendants from withholding the quotations from plaintiff, or from discriminating between plaintiff and other persons in that regard.<sup>1</sup> And a telegraph company which has constructed and is operating lines of telegraph along the right of way of a railroad company can not maintain a bill to enjoin other telegraph companies from so doing, although it may be protected by injunction in the possession of its own lines.<sup>2</sup>

<sup>1</sup>New York & C. G. & S. Exchange v. Board of Trade of Chicago, 127 Ill., 153. See, *contra*, Metropolitan G. & S. Exchange v. Mutual U. T. Co., 11 Biss., 531; S. C. *sub nom.* Metropolitan G. & S. Exchange v. Chicago Board of Trade, 15 Fed. Rep., 847.

<sup>2</sup>Western Union T. Co. v. National T. Co., 23 Blatch., 108; Western Union T. Co. v. American Union T. Co., 9 Biss., 72; Pensacola T. Co. v. Western Union T. Co., 96 U. S., 1.

## II. INJUNCTIONS IN BEHALF OF SHAREHOLDERS.

- § 1203. The general doctrine stated.  
1204. Illustrations of the relief.  
1205. Departure from purpose of incorporation.  
1206. Diligence required; illustrations.  
1207. Single shareholder allowed relief.  
1208. Applications to legislature, when enjoined.  
1209. The same.  
1210. Acts in furtherance of objects not enjoined; officers not enjoined from exercising functions.  
1211. Consolidation and merger.  
1212. Estoppel against shareholder.  
1213. Disposition of property, when not enjoined.  
1214. Judgment confessed; bill in aid of other persons.  
1215. Lease by corporation.  
1216. Minority protected against majority.  
1217. Payment of dividends.  
1218. Sale of property under execution; judgment in favor of receiver for unpaid subscription.  
1219. Former shareholder; sale of stock for unpaid assessments.  
1220. Transfer of shares of mining stock when lost.  
1221. Officers of canal enjoined by United States.  
1222. Auditing improper account.  
1223. Special privileges to corporators.

§ 1203. The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule, that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporator.<sup>1</sup>

<sup>1</sup> *Kean v. Johnson*, 1 Stockt., *Manderson v. Commercial Bank*, 401, a leading American case; 28 Pa. St., 379; *Sears v. Hotchkiss*,

And in such case equity may grant relief at the suit of a single stockholder.<sup>1</sup> So if the managers of the company are about to engage in any enterprise not contemplated by their charter, or are proceeding to apply corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere.<sup>2</sup> And where a railway company, without authority of law, is proceeding to become a stockholder in another company, it may be enjoined by its stockholders from thus transcending its charter, the relief being granted as well for the protection of the stockholders, as because the proceedings are contrary to public policy.<sup>3</sup> So one who owns and holds as security a large quantity of the stock of an incorporated company may enjoin the transfer of the corporate property to another corporation organized in a foreign state, upon a bill alleging that such transfer was intended to render his stock worthless and to deprive him of all control in the company.<sup>4</sup>

§-1204. In accordance with the principles laid down in the preceding section, it has been held that shareholders in a bank are entitled to an injunction against the officers of the bank to prevent the continued commission of acts which are contrary to law and which endanger the existence of the charter; and this even where, from the affidavits exhib-

25 Conn., 171; *Bagshaw v. Eastern R. Co.*, 7 Hare, 114; *Colman v. Eastern Counties R. Co.*, 10 Beav., 1; *Attorney-General v. Great N. R. Co.*, 1 Dr. & Sm., 154; *Central R. Co. v. Collins*, 40 Ga., 582; *Frostburg Building Association v. Stark*, 47 Md., 338; *Fraser v. Whalley*, 2 Hem. & M., 10; *Tipton Fire Co. v. Barnheisel*, 92 Ind., 88.

<sup>1</sup> *Kean v. Johnson*, 1 Stockt., 401; *Mozley v. Alston*, 1 Ph., 798; *Simpson v. Westminster P. H. Co.*, 8 H. L., 717. And see *Gifford v. New Jersey R. & T. Co.*, 2 Stockt., 171, and *Stewart v. Erie & W. T. Co.*, 17 Minn., 372, where the same principle is upheld, although the injunction seems to have been refused on other grounds.

<sup>2</sup> *Smith v. Bangs*, 15 Ill., 399; *Beman v. Rufford*, 6 Eng. Law & Eq. R., 106; *Simpson v. Denison*, 10 Hare, 51; *Cherokee Iron Co. v. Jones*, 52 Ga., 276; *Cohen v. Wilkinson*, 1 Mac. & G., 481.

<sup>3</sup> *Central R. Co. v. Collins*, 40 Ga., 582; *Salomons v. Laing*, 12 Beav., 339.

<sup>4</sup> *Kelly v. Mariposa L. & M. Co.*, 4 Hun, 632.

ited on both sides, the truth of the charge is left somewhat in doubt, since the awarding of an injunction under such circumstances can work no injury, and only affords the stockholders a proper measure of protection.<sup>1</sup> And gross mismanagement of the affairs of a corporation by its directors, coupled with the embezzlement by its officers of large sums of money, and a refusal on the part of the directors to institute proceedings for their recovery, afford sufficient ground for enjoining the directors from further management of the affairs of the corporation, upon a bill filed by shareholders.<sup>2</sup> So a minority of the stockholders of a corporation, some of whom are also directors, may enjoin the remaining stockholders, who control a large portion of the stock and constitute a majority of the board of directors, from fraudulently mismanaging the business, or diverting the funds.<sup>3</sup>

§ 1205. As still further illustrating the doctrine of relief by injunction against a departure from the purpose of the incorporation, it is held that where a company is incorporated for manufacturing iron, a shareholder is entitled to a preliminary injunction until the final hearing to prevent the use of the corporate funds for a purpose foreign to that contemplated by the charter, as for the erection of a flouring mill; since a shareholder has the right to insist that the corporate funds shall be devoted to the uses designated by the charter.<sup>4</sup> And since a shareholder in a corporation is entitled to have the contract to which he has subscribed strictly performed, he is, for this reason, entitled to restrain a departure from the object of the incorporation. Thus, a stockholder in a railway company may enjoin a diversion of the corporate funds by building only a small portion of

<sup>1</sup> *Manderson v. Commercial Bank*, 28 Pa. St., 379.

<sup>2</sup> *Frostburg Building Association v. Stark*, 47 Md., 338.

<sup>3</sup> *Sears v. Hotchkiss*, 25 Conn., 171. And it is held that the fact that a remedy at law exists by an

action in behalf of the corporation, or of the aggrieved stockholders, against the wrong-doers, constitutes no bar to an injunction in such a case. *Id.*

<sup>4</sup> *Cherokee Iron Co. v. Jones*, 53 Ga., 276.



the road as originally contemplated.<sup>1</sup> But the acquiescence of a shareholder, in such a case, in the building of a smaller portion of the road than that originally contemplated and authorized, will estop him from relief by injunction against such construction. And it is proper, also, for the court to consider, as ground for refusing the relief, the fact that the work has proceeded almost to completion, at a large outlay of money, and that its stoppage by an injunction would be extremely disastrous.<sup>2</sup> Nor can a shareholder owning a minority of the capital stock restrain the holders of a majority of the shares from accepting an amendment to the charter, such as a change in the number of directors, which does not work a fraudulent change in the objects of the corporation.<sup>3</sup>

§ 1206. A shareholder must, however, use due diligence in the assertion of his rights, to entitle him to relief in equity against a wrongful diversion of corporate funds, or other misconduct on the part of the company, and negligence on his part in instituting proceedings will deprive him of the relief desired.<sup>4</sup> And where a corporation departs from the original object of its charter, without the consent of all its stockholders, he who would avail himself of the remedy by injunction must show that he has been prompt and vigilant in claiming the aid of equity, since if he waits until the mischief complained of is accomplished, or until large sums of money have been expended and great public interests created, he will be held to have acquiesced in the change.<sup>5</sup> Thus, an injunction will be refused in behalf of shareholders of a railway company, seeking to restrain its construction

<sup>1</sup> *Cohen v. Wilkinson*, 1 Mac. & G., 481.

<sup>2</sup> *Graham v. Birkenhead L. & C. J. R. Co.*, 2 Mac. & G., 146.

<sup>3</sup> *Mower v. Staples*, 32 Minn., 284.

<sup>4</sup> *Gregory v. Patchett*, 33 Beav., 595; *Kent v. Jackson*, 14 Beav., 367; *Gray v. Chaplin*, 2 Russ., 126; *Chapman v. Mad River R. Co.*, 6

*Ohio St.*, 119; *Ffooks v. South Western R. Co.*, 1 Sm. & Gif., 142.

<sup>5</sup> *Chapman v. Mad River R. Co.*, 6 *Ohio St.*, 119; *Goodin v. Cincinnati R. Co.*, 18 *Ohio St.*, 169; *Leo v. Union Pacific R. Co.*, 22 *Blatch.*, 22. And see *Chapman v. Railroad Companies*, 6 *Ohio St.*, 136; *Watt's Appeal*, 78 *Pa. St.*, 370.

upon the ground that the time has expired within which it should be completed, when there has been long acquiescence on the part of plaintiffs. And in such case a shareholder is bound by the acquiescence of one from whom he has purchased his share, although he himself is chargeable with no delay.<sup>1</sup>

§ 1207. In cases where relief in equity is sought by an aggrieved shareholder against any mismanagement of the corporate business, or misappropriation of corporate funds, the amount of the interest of such shareholder will not be considered in granting the relief.<sup>2</sup> And a single shareholder, suing in behalf of himself and all others having a common interest with him, is entitled to the aid of equity to prevent a diversion of corporate funds to other than corporate purposes, though all the other members of the company are opposed to him;<sup>3</sup> since, while the members and shareholders of an incorporated company may possibly change the contract which they have entered into with each other and form a new one by common consent of all parties, they have no right so to do without the consent of every shareholder in the company.<sup>4</sup> But, although the jurisdiction by injunction for the protection of a single shareholder from illegal acts of the corporation is well established, it will not be exercised upon a suit by a shareholder to restrain the enforcement by the corporation of a contract with another corporation, when the defendant company itself repudiates the contract and refuses to act upon it, since equity does not interfere by injunction to prevent imagined wrongs which there is no real ground for apprehending.<sup>5</sup> Nor will the relief be granted in behalf of a single shareholder when it appears that he is only a colorable plaintiff, acting in the

<sup>1</sup> *Ffooks v. South Western R. Co.*, 8 H. L., 717; *Beman v. Rufford*, 1 Sm. & Gif., 142.      *Sim. N. S.*, 564.

<sup>2</sup> *McDonnell v. Grand Canal Co.*, 3 Ir. Ch., 578.      <sup>4</sup> *Ernest v. Nicholls*, 6 H. L., 401; *Ex parte Morgan*, 1 Mac. & G., 236.

<sup>3</sup> *Kean v. Johnson*, 1 Stockt., 401;      <sup>5</sup> *Stewart v. Erie & W. T. Co.*, 17 *Minn.*, 872.  
*Mozley v. Alston*, 1 Ph., 798;      *Simpson v. Westminster P. H. Co.*,

interest of other parties who are interested in a rival corporation.<sup>1</sup>

§ 1208. Some apparent conflict is to be found in the adjudicated cases upon the right of stockholders to restrain corporate authorities from taking steps to change the powers or extend the business of the company, by invoking legislative action for that purpose. This conflict is, however, more apparent than real, and no difficulty will be found in reconciling the decisions by observing the distinction between cases of a simple application to the legislative authority for a change in the constitution or powers of an incorporated company, and cases where it is sought to divert corporate funds from their legitimate use for defraying the expenses of such an application. The right of a company, acting in its corporate capacity, to invoke legislative aid for changing the objects and powers of the corporation is unquestioned, and equity will not, at the suit of a shareholder of a company incorporated by act of parliament, enjoin an application to parliament for a change in the constitution of the company by extending its powers or by substituting a new body for the old.<sup>2</sup> Nor will an injunction be granted to restrain the trustees of a corporation organized in a foreign country from applying to the legislature of that country for power to increase its capital stock.<sup>3</sup> And an injunction will not be allowed to restrain a corporation from applying to the legislature for a change of its powers upon the ground that, in the opinion of the complaining shareholders, the proposed legislation is inexpedient.<sup>4</sup> But where it is attempted to use corporate funds for defraying the expenses of such an application, and for procuring an extension of the business of the company be-

<sup>1</sup> *Filder v. London R. Co.*, 1 Hem. Co. v. *Rushout*, 5 DeG. & Sm., & M., 489. And see *Sparhawk v. Union P. R. Co.*, 54 Pa. St., 401. <sup>3</sup> *Bill v. Sierra Nevada Co.*, 1

<sup>2</sup> *Ware v. Grand Junction Water Works Co.*, 2 Russ. & M., 470; <sup>4</sup> *In re London, Chatham & Stevens v. South Devon R. Co.*, 13 Dover Railway Arrangement Act, Beav., 48. See *Great Western R. L. R.* 5 Ch., 671.

yond the legitimate objects for which it was constituted, an injunction may be allowed, at the suit of shareholders, to prevent such improper diversion of the funds.<sup>1</sup>

§ 1209. Notwithstanding the general rule laid down in the preceding section, that equity will not enjoin an application to the legislature for an extension of the powers of an incorporated company, relief may properly be granted against an application whose object is the destruction of the existing corporation. And where a majority of the members of a company are taking steps to surrender their charter, with a view to obtaining a new one for a purpose entirely different from that originally contemplated in the creation of the corporation, the minority of the shareholders may rightfully enjoin the proceedings until a hearing.<sup>2</sup>

§ 1210. Although a shareholder may properly enjoin a corporation from employing its property in a way wholly or materially different from that which was designed by the act of incorporation, yet he will not be allowed to enjoin the doing of acts in direct furtherance of the object of its creation, and which are for the benefit of all the stockholders as such, even though such acts may be injurious to the party complaining in another capacity than that of stockholder, and although the interest of other persons or of the public may be injuriously affected thereby.<sup>3</sup> Nor will a court of equity, at the suit of stockholders of a corporation, restrain its officers from the exercise of their functions, since such restraint would be equivalent to removal from office, and over such a subject equity has no jurisdiction.<sup>4</sup> So a shareholder can not enjoin directors from selling a

<sup>1</sup> *Simpson v. Denison*, 10 Hare, 62; *Munt v. Shrewsbury R. Co.*, 13 Beav., 1; *Stevens v. South Devon R. Co.*, *Ib.*, 48; *Spackman v. Lattimore*, 3 Gif., 16; *Great Western R. Co. v. Rushout*, 5 DeG. & Sm., 290; *Vance v. East Lancashire R. Co.*, 3 Kay & J., 50. See also *Attorney-General v. Commissioners*

of Kingstown, 1 R. 7 Eq., 383; *Telford v. Metropolitan Board of Works*, L. R. 13 Eq., 574.

<sup>2</sup> *Ward v. Society of Attornies*, 1 Coll., 370.

<sup>3</sup> *Baltimore & Ohio R. Co. v. Wheeling*, 18 Grat., 40.

<sup>4</sup> *Bayless v. Orne*, Freem. Ch., 161.

portion of the shares to the president at par and for a full and valuable consideration, when the directors are acting within the scope of their authority and the transaction is free from fraud.<sup>1</sup> And equity will not, at the suit of a shareholder, interfere with the action of the directors unless they have exceeded their corporate powers, or unless their acts are fraudulent or collusive, and injurious to the rights of plaintiff. Thus, where a corporation engaged in the steamship business has contracted to pay certain subsidies to induce a rival line to withdraw from competition, the enforcement of such contract will not be restrained at the suit of a shareholder, the contract being within the corporate powers of the company and no fraud being shown.<sup>2</sup>

§ 1211. A consolidation or merger of one incorporated company with another, without authority and without consent of the stockholders as required by the articles of association, may, as to the property not yet transferred, be enjoined until the final hearing of the cause.<sup>3</sup> But the new company will not be enjoined from the use of property already transferred, nor will it be restrained from receiving from the stockholders of the old company a surrender of their stock, for the purpose of merging it in the new association.<sup>4</sup>

§ 1212. Where the conduct of the person complaining has been such as to amount to a waiver of his right to object to a proposed conversion of the corporate funds to other than the uses for which they were originally intended, he will not be allowed relief in equity against such use of the funds. Thus, where a depositor in a savings bank has consented that his deposits may be converted into stock, as a security for the payment of the debts of the corporation, and his conduct has been such as to amount to a voluntary dedication of his stock for the purpose of securing the debts,

<sup>1</sup> *Sims v. Street Railroad Co.*, 37 Ohio St., 556.

<sup>2</sup> *Leslie v. Lorillard*, 110 N.Y., 519.

<sup>3</sup> *Blatchford v. Ross*, 54 Barb., 42.

<sup>4</sup> *Id.*

he is regarded as estopped from claiming relief in equity, and an injunction will be refused.<sup>1</sup>

§ 1213. A shareholder of a corporation, claiming that he has been defrauded in the issue of stock, can not enjoin the corporation from disposing of so much of its property as would indemnify him for his loss, since the money which he has contributed having been mixed with the general funds, he stands in no better position than that of a general creditor of the corporation.<sup>2</sup>

§ 1214. Notwithstanding courts of equity may properly interfere at the suit of stockholders for the protection of an incorporated company, yet where a debt authorized by the company has been created by and with the consent of the shareholders and directors, and judgment is confessed therefor, a consenting shareholder is estopped from enjoining an execution under such judgment.<sup>3</sup> Nor will an injunction be allowed against the proceedings of a corporation at the suit of a stockholder, when it appears that his bill is not filed *bona fide* for his own protection, but is only a private bill in aid of other persons.<sup>4</sup>

§ 1215. A shareholder in a corporation will not be allowed to enjoin the management of its business and works under a lease made by its directors, no fraud being alleged or shown.<sup>5</sup> Nor will a court of equity, at the suit of a small number of shareholders, enjoin the execution by a corporation or its directors of a lease of its property, canal, railroads and franchises to another corporation for a stipulated annual rental, when such lease is made under a valid act of legislature authorizing the lease upon the consent of a given number of shareholders, and providing that any shareholder who is dissatisfied shall be paid the full value

<sup>1</sup> Maryland Savings Institution v. Schroeder, 8 Gill & J., 93.

<sup>4</sup> Sparhawk v. Union P. R. Co., 54 Pa. St., 401. And see Filder v.

<sup>2</sup> Whelpley v. Erie R. Co., 6 London R. Co., 1 Hem. & M., 489. Blatch., 271.

<sup>5</sup> Bowes v. Hoeg, 15 Fla., 403.

<sup>3</sup> Gravenstine's Appeal, 49 Pa. St., 310.

of his stock, to be appraised by commissioners appointed for that purpose.<sup>1</sup>

§ 1216. The protection which is extended by courts of equity to shareholders of corporations may be properly invoked in behalf of a minority against the wrongful acts of a majority of the shareholders. And where the shareholders agree to discontinue the operations of a corporation, and to wind up and adjust its affairs, but a majority agree upon an arbitrary scheme or plan of settlement of the rights and liberties of the different members, to which the minority do not assent, the majority may be enjoined from carrying out such proposed scheme of settlement.<sup>2</sup> But equity will hesitate to interfere by injunction in behalf of a minority of shareholders to restrain the majority of the shareholders and the directors from borrowing money to improve the corporate property, when the proof is conflicting and the difference between the parties is largely a difference as to the policy and internal management of the corporation.<sup>3</sup>

§ 1217. Relief by injunction is sometimes invoked for the purpose of restraining the payment of illegal dividends. And upon a bill by some of the shareholders of a corporation to enjoin the payment of dividends contrary to the act of incorporation, it is proper to enjoin the payment of future dividends, but not of dividends already declared, when the shareholders are not all before the court. The reason for such distinction is found in the fact that, as to dividends already declared, each shareholder has a right of action for their recovery, and it is therefore improper to interfere when they are not all before the court.<sup>4</sup> But a corporation will not be enjoined from the payment of dividends to its shareholders because of its indebtedness to plaintiff, which is sought to be enforced by the action, when plaintiff's only

<sup>1</sup> *Black v. Delaware & R. C. Co.*,  
7 C. E. Green, 130.

<sup>2</sup> *City Loan & Building Association v. Goodrich*, 48 Ga., 445.

<sup>3</sup> *Lamar v. Lanier H. Co.*, 76 Ga., 640.

<sup>4</sup> *Carlisle v. South Eastern R. Co.*,  
1 Mac. & G., 689; *Fawcett v. Laurie*,  
1 Dr. & Sm., 192.

demand is of a pecuniary nature resting in a contract whose specific performance is sought, and when the contract is of such a nature as to render it improbable that it can be specifically enforced.<sup>1</sup>

§ 1218. Equity will not enjoin a sale of the property of a corporation under an execution upon a judgment which is alleged to be void, upon a bill by a shareholder and creditor of the company, when sufficient remedy exists at law, and when it is shown that the officers of the company have been requested to take the necessary steps at law, or that such request has been omitted for some sufficient reason.<sup>2</sup> So a shareholder can not enjoin a sale of the corporate property under foreclosure, judgment having been regularly obtained against the corporation, even though plaintiff had no notice of the proceeding.<sup>3</sup> And where, by the terms of its charter, a judgment against an incorporated company is made binding upon its shareholders, one who has had notice of the pendency of actions against the corporation, and who has declined to make any defense thereto, will be regarded as having had his day in court, and will not be permitted to enjoin such a judgment.<sup>4</sup> So under a statute authorizing the appointment of receivers to wind up the affairs of insolvent corporations, and requiring such receivers to collect from the shareholders the sums remaining due on account of their unpaid subscriptions to the capital stock, when such a receiver has obtained a decree for the balance due from a shareholder, the latter can not enjoin the receiver from collecting the amount until all the debts of the corporation can be ascertained and the amount due from each stockholder be determined, since such grounds should have been urged, if at all, in defense of the suit brought by the receiver.<sup>5</sup>

<sup>1</sup> *South Yorkshire R. Co. v. Great Northern R. Co.*, 1 Sm. & Gif., 324.

<sup>3</sup> *Henry v. Elder*, 63 Ga., 347.

<sup>4</sup> *Lowry v. Sloan*, 51 Ga., 633.

<sup>5</sup> *Pentz v. Hawley*, 1 Barb. Ch.,

<sup>2</sup> *City of Atlanta v. Grant*, 57 Ga., 122.  
340. See also *Ware v. Bazemore*,  
58 Ga., 316.



§ 1219. An injunction, however, may properly be allowed upon a bill by a former shareholder in a banking corporation, who has sold his stock to the bank, to restrain it from continuing his name as shareholder, thereby rendering him liable to actions by creditors of the bank.<sup>1</sup> So a shareholder is entitled to the aid of an injunction to prevent the consummation of a sale of his stock for unpaid assessments, when he has tendered the amount of his assessment before such sale.<sup>2</sup> So upon the ground of preventing irreparable injury and a multiplicity of suits, a shareholder may enjoin a sale of his stock for the payment of a call or assessment made by directors who have been illegally elected or appointed.<sup>3</sup> But a shareholder can not enjoin a sale of his stock to satisfy an unpaid assessment which is justly due, upon the ground that the notice of sale was published an insufficient time, when he has not paid or tendered payment of the assessment.<sup>4</sup>

§ 1220. It is held in Nevada, that in an action to recover possession of shares of mining stock purchased by the plaintiff, a mining corporation, and to quiet its title thereto, the shares having been lost or stolen from plaintiff's possession, it is proper to enjoin defendants from transferring such shares to any person other than plaintiff, they having no market value which could be estimated so as to afford an effectual remedy at law in damages.<sup>5</sup>

§ 1221. Where the United States was interested in and was the only shareholder in a canal, and had voted an appropriation for its improvement and repairs, for the better use and benefit of the public, the president and directors of

<sup>1</sup> *Taylor v. Hughes*, 7 Ir. Eq., 529, affirming S. C. upon the preliminary hearing, 6 Ir. Eq., 480.

<sup>2</sup> *Mitchell v. Vermont C. M. Co.*, 67 N. Y., 280.

<sup>3</sup> *Moses v. Tompkins*, 84 Ala., 613.

<sup>4</sup> *Burham v. San Francisco F. M. Co.*, 76 Cal., 26.

<sup>5</sup> *Sierra Nevada Mining Co. v.*

*Sears*, 10 Nev., 346. It is to be noted, however, that under the practice in Nevada in an action for the recovery of personal property it is competent for the court to enjoin the person wrongfully in possession from disposing of the property, when the remedy at law would otherwise prove ineffectual.

the canal company were enjoined from interfering with the engineer officers and contractors of the government in prosecuting the work of repairing and improving the canal.<sup>1</sup>

§ 1222. It is held that a court of equity will not, in behalf of shareholders of an incorporated company, enjoin the board of directors of the corporation from auditing or allowing an improper account against the company, since the act of allowing such account as correct is not such an act of irreparable injury as to merit relief by injunction.<sup>2</sup>

§ 1223. It is also held that one who becomes a shareholder in a corporation, under a charter and regulations which extend especial rights and privileges to certain members, is bound by the rules and conditions existing at the time he becomes a member; and he can not, therefore, enjoin the corporation from preventing his participation in such exclusive privileges.<sup>3</sup>

<sup>1</sup> *United States v. Louisville & P. Canal Co.*, 4 Dill., 601.

<sup>3</sup> *Johnson v. La Variete Association*, 28 La. An., 421.

<sup>2</sup> *Rogers v. Lafayette Agricultural Works*, 52 Ind., 296.

## III. ULTRA VIRES.

- § 1224. Corporate bodies enjoined from proceeding in excess of authority.
1225. Misappropriation of funds.
1226. Issue of preferred stock; arbitration concerning contracts *ultra vires*.
1227. Lease of entire property enjoined; good faith of plaintiffs.
1228. Plaintiffs must be actual shareholders; pledgees denied relief.
1229. Acquiescence of shareholders as an estoppel; corporation enjoined from resuming possession of property unlawfully leased.

§ 1224. The doctrine of *ultra vires*, although of modern origin, is frequently invoked for the purpose of restraining the action of corporate bodies when proceeding in excess of their authority. And it may be stated as a general rule that where corporations are created by law for special purposes, they may properly be restrained in equity from exceeding the legitimate scope of their authority, or going beyond the purposes for which they were created.<sup>1</sup> Thus, a railway company has been enjoined from conducting the business of coal merchants, the company having been created for the specific purpose of constructing a railway. And the action may be properly brought in such case by the attorney-general upon the relation of a private person having no interest in the company.<sup>2</sup> So a shareholder,

<sup>1</sup> Attorney-General *v.* Great N. R. Co., 1 Dr. & Sm., 154; Colman *v.* Eastern Counties R. Co., 10 Beav., 1; Salomons *v.* Laing, 12 Beav., 339; Pickering *v.* Stephenson, L. R. 14 Eq., 322; Hutton *v.* Scarborough Cliff Hotel Co., 13 W. R., 631, affirming S. C., *Ib.*, 574, 2 Drew. & Sm., 514; Kernaughan *v.* Williams, L. R. 6 Eq., 228; Maunsell *v.* Midland R. Co., 1 Hem. & M., 130; McDonnell *v.* Grand Canal Co., 3 Ir. Ch., 578; Beman *v.* Rufford, 6 Eng. Law & Eq. R., 106; Simpson *v.* Denison, 10 Hare, 51; Cohen *v.* Wilkinson, 1 Mac. & G., 481; Cherokee Iron Co. *v.* Jones, 52 Ga., 276.

<sup>2</sup> Attorney-General *v.* Great N. R. Co., 1 Dr. & Sm., 154. It was asserted by Vice Chancellor Wood in this case to be a "principle of public policy, that where parliament has authorized a company to raise a large capital for a specific purpose, the privilege confers no right upon the company to employ its capital in competition with the

suing in behalf of himself and all other shareholders of a railway company, may enjoin the company from using its funds in establishing a steam packet company in connection with the railway.<sup>1</sup> So, too, the relief will be allowed to prevent a railway company from purchasing shares in another company, such an act being clearly *ultra vires*, and unauthorized by its charter.<sup>2</sup>

§ 1225. In accordance with the general doctrine as above stated, it is held that a shareholder in a corporation may enjoin a misappropriation of the corporate funds by the directors in a matter which is *ultra vires* as to the corporation.<sup>3</sup> So equity will, at the suit of a shareholder in a corporation, enjoin its officers from applying its funds in the prosecution of a suit not instituted by the corporation. And the relief may be allowed in such case, even though the act enjoined has been sanctioned by a resolution of a majority of the shareholders, since in a matter which is *ultra vires* the majority have no power to bind the minority.<sup>4</sup>

§ 1226. Equity may, also, at the suit of dissatisfied shareholders who have not assented thereto, enjoin the directors of a corporation from issuing shares of preferred stock in accordance with the action of a meeting of shareholders, when such action is unauthorized and *ultra vires*.<sup>5</sup> But a shareholder who has acquiesced for a series of years in the issuing of such preferred stock, the shares having passed meantime into the hands of innocent purchasers, will be denied relief by injunction.<sup>6</sup> A shareholder is entitled to

general public upon speculations of a different kind."

<sup>1</sup> Colman v. Eastern Counties R. Co., 10 Beav., 1.

<sup>2</sup> Salomons v. Laing, 12 Beav., 339; Hazlehurst v. Savannah, G. & N. A. R. Co., 43 Ga., 13.

<sup>3</sup> Cherokee Iron Co. v. Jones, 52 Ga., 276; Pickering v. Stephenson, L. R. 14 Eq., 322. See also Smith

v. Bangs, 15 Ill., 399; Simpson v. Denison, 10 Hare, 51; Sears v. Hotchkiss, 25 Conn., 171.

<sup>4</sup> Kernaghan v. Williams, L. R. 6 Eq., 228.

<sup>5</sup> Hutton v. Scarborough Cliff Hotel Co., 13 W. R., 631, affirming S. C., Ib., 574, 2 Drew. & Sm., 514.

<sup>6</sup> Kent v. Quicksilver M. Co., 78 N. Y., 159.

the aid of an injunction to restrain the corporation from proceeding to arbitration concerning alleged breaches of contracts which are *ultra vires* as to the corporation. In such case the relief is proper upon the general principle that equity may, at the suit of a shareholder, enjoin the directors of a corporation from acting in excess of their corporate powers.<sup>1</sup>

§ 1227. Equity has jurisdiction upon a suit by shareholders of an incorporated company to interfere by injunction and will enjoin a transfer or lease of all the property of the corporation, such act being in excess of the corporate powers and clearly illegal.<sup>2</sup> The court will, however, in such a case look to the *bona fides* of the shareholders seeking its extraordinary aid. And if it is apparent that they were not shareholders at the time the transactions complained of occurred, and that they have purchased their shares for a merely nominal consideration for the purpose of obtaining the injunction sought, it may properly refuse to interfere in their behalf.<sup>3</sup>

§ 1228. It is, however, important to observe that to warrant relief by injunction against illegal or fraudulent proceedings of corporate officers, in excess of the powers conferred by their charter, plaintiffs invoking the extraordinary aid of the court must occupy the relation of shareholders to the corporation. And mere subscribers to the capital stock, who have not complied with the terms of their subscription, do not sustain such a relation toward the corporation as to entitle them to the aid of an injunction.<sup>4</sup> But an injunction against holding a meeting to increase the indebtedness of the corporation has been refused when sought by pledgees of shares not having the absolute title.<sup>5</sup>

<sup>1</sup> *Maunsell v. Midland R. Co.*, 1 Hem. & M., 130.

<sup>2</sup> *McDonnell v. Grand Canal Co.*, 3 Ir. Ch., 573.

<sup>3</sup> *McDonnell v. Midland G. W. R. Co.*, 3 Ir. Ch., 578.

<sup>4</sup> *Busey v. Hooper*, 35 Md., 15.

<sup>5</sup> *Becher v. Wells F. M. Co.*, 1 McCrary, 62; S. C., 1 Fed. Rep., 276.

§ 1229. While a court of equity may, as is thus shown, interfere by injunction at the suit of a shareholder in a corporation to restrain the corporate officers from acting *ultra vires*, or transcending their well defined powers, yet the consent and acquiescence of the complaining shareholders may be such as to deprive them of relief in equity. Thus, shareholders in a railway company who have acquiesced in the making of a contract for completing the railway, to be paid for in a certain manner, will not be permitted after completion of the work to enjoin payment in accordance with the contract upon the ground that the proceedings were *ultra vires*. And the relief is properly refused in such case upon the ground that, having received the benefit of the contract and having acquiesced therein, they are estopped in equity from setting up the doctrine of *ultra vires* as a ground for enjoining such payment.<sup>1</sup> So shareholders in a railway company will not be permitted to enjoin the consummation by the company of the purchase of another railway, when it is apparent that the original purchase was made with the full knowledge of plaintiffs, and without objection on their part; especially when it appears that the granting of the injunction would result in great and irreparable injury to others.<sup>2</sup> And an injunction will lie to prevent one of two contracting corporations from forcibly resuming possession of property which it has leased to the other, although the lease is *ultra vires*, when the defendant has received compensation therefor, leaving it to institute legal proceedings for the recovery of the property and for an accounting.<sup>3</sup>

<sup>1</sup> *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga., 13.

<sup>2</sup> *Cozart v. Georgia Railroad & Banking Co.*, 54 Ga., 379.

<sup>3</sup> *American U. T. Co. v. Union Pacific R. Co.*, 1 McCrary, 188;

*Atlantic & P. T. Co. v. Union Pacific R. Co.*, 1 McCrary, 541; S. C., 1 Fed. Rep., 745; *Western Union T. Co. v. St. Joseph & W. R. Co.*, 1 McCrary, 565.

## IV. CORPORATE ELECTIONS.

§ 1230. Injunctions against corporate elections of American origin.

1231. Illustrations of the relief.

1232. Further illustrations.

1233. Conspiracy by minority of shareholders.

1234. When relief refused.

1235. Equity does not determine questions of title to public office.

§ 1230. While the propriety of equitable interference by injunction with the election of officers of private corporations has been frequently criticised, and with no inconsiderable show of justice, the jurisdiction itself, although sparingly exercised, is too firmly established to be readily shaken without the intervention of legislative authority. The jurisdiction is, however, almost entirely of American growth, the English authorities affording few instances of its exercise. It seems to have been early recognized by the New York Court of Chancery, although the right to relief was denied under the circumstances of the particular case.<sup>1</sup>

<sup>1</sup> *Haight v. Day*, 1 Johns. Ch., 18, decided in 1814. The case was that of a bill by subscribers to the capital stock of a bank, praying an injunction against the commissioners appointed to receive subscriptions and to effect the organization, to restrain them from proceeding to an election of officers. The bill charged that the commissioners had arbitrarily, and without plaintiffs' consent, distributed a large number of shares of stock among themselves, their relatives and friends, in fraud of the rights of plaintiffs. The charges of fraud being fully negatived by the answer, a preliminary injunction which had been granted upon the filing of the bill was dissolved upon motion and hearing. Chancellor Kent, without expressly de-

ciding the question of jurisdiction, seems to have tacitly recognized it as within the power of the court to grant preventive relief in such cases; and it may, perhaps, be inferred from the language of his opinion that there were previous, although unreported, instances of the exercise of the jurisdiction in New York. In dissolving the injunction the Chancellor seems to have been governed chiefly by considerations of the extreme hardship which might result from its continuance, since the prevention of the election at that stage of the organization would operate as a dissolution of the body corporate; and the charges of fraud and improper exercise of official discretion upon the part of defendants being fully negatived by the an-

And in a later case in the same court, where it was also sought upon grounds of fraudulent and improper conduct to enjoin the commissioners appointed to receive subscriptions to the capital stock of a corporation and to complete its organization, from holding an election for directors, the power of the court to grant the desired relief was clearly and emphatically asserted, although the relief was denied, chiefly because the principal averments of the bill were made only upon information and belief; and because, also, the injunction, if granted, would seriously affect the rights of other shareholders not before the court and who had no opportunity to be heard.<sup>1</sup>

§ 1231. Where the directors of a corporation fraudulently transfer to themselves certain shares of capital stock for the purpose of retaining themselves in office by controlling the elections, such transfer being made by them under a resolution passed at a directors' meeting held beyond the borders of the state, their action will be treated as fraudulent and void, and they may be enjoined from voting the shares thus

swer, the court could not do otherwise than dissolve the injunction.

<sup>1</sup>Walker v. Devereaux, 4 Paige, 229, decided in 1833. Upon the question of jurisdiction, Chancellor Walworth used the following language: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of a corporation. But, in the exercise of such a power, the

court should require ample security from the complainant to pay all damages other persons might sustain by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant, that he is informed and believes the existence of the fact, may be a sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had any opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights."



fraudulently transferred. And in such case, the acceptance by a shareholder of a dividend upon his stock would seem not to be such a ratification of the illegal action of the directors as to estop such shareholder from relief in equity by injunction.<sup>1</sup> So a court of equity may, at the suit of shareholders, enjoin the directors of a corporation from issuing new shares of stock for the purpose of controlling an approaching meeting of shareholders.<sup>2</sup>

§ 1232. It is also held that where the charter of a banking company prescribes certain rules and limitations for voting upon shares of its capital stock, fixing a maximum number of votes as the limit to which each shareholder shall be entitled, shareholders who fraudulently procure shares, which are pledged by them to the bank as security for advances to be colorably transferred to other persons without consideration, taking from such transferees powers of attorney to vote the stock thus transferred, may be enjoined from voting such shares. And the ground for relief in such case is found in the fact that the action of defendants constitutes a fraud upon the complaining shareholders, being in violation of the spirit of the charter and in derogation of their chartered rights.<sup>3</sup> And under similar provisions in a charter, upon a bill alleging that defendants have made colorable transfers of stock to different persons with the fraudulent intent of evading the charter by increasing the number of votes which they can control, an injunction may be allowed against the voting of such shares, either in person or by any power of attorney from the fraudulent transferees, and to restrain the judges of election from receiving such votes. And in such case it is held that a statute regulating the canvassing of votes at corporate elections, and prescribing an oath to be administered to the voter or to a proxy, as well as fixing the mode of voting by proxy, does not afford such a remedy at law as to oust the juris-

<sup>1</sup>Hilles v. Parish, 1 McCart., 380.      <sup>3</sup>Campbell v. Poultney, 6 Gill &

<sup>2</sup>Fraser v. Whalley, 2 Hem. & J., 94.

diction of equity, such statutory regulations being merely safeguards to promote a fair election and not in themselves affording a remedy at law in the technical sense of the term.<sup>1</sup>

§ 1233. Upon a bill by plaintiffs occupying the relation of trustees, and holding a large number of shares of stock under an agreement defining their trust and authorizing them to vote the shares so held, the bill charging defendants, having control of a minority of shares, with conspiring together to obtain an *ex parte* injunction against plaintiffs, restraining them from voting the shares held by them, and thus enabling defendants to elect a board of directors against the wishes of a majority of the shareholders, the case was regarded as presenting such elements of irreparable injury as to warrant an injunction, the principal averments of the bill not being denied.<sup>2</sup>

§ 1234. A court of equity will not, however, upon a bill by a minority of the board of directors of a corporation against the majority, charging them with having fraudulently issued stock to a large amount for the purpose of controlling an election, enjoin one of the defendant directors from voting an excess of stock charged to be wrongfully held by him, when the corporation has taken no steps to cancel such excess or to declare it void, and when no irreparable or permanent injury is shown as likely to result from such defendant voting the excess of stock.<sup>3</sup>

§ 1235. It is also to be observed that courts of equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law in the nature of a *quo warranto*.<sup>4</sup> Nor is the fact that relief is claimed upon the

<sup>1</sup> Webb v. Ridgely, 38 Md., 364.

<sup>2</sup> Brown v. Pacific Mail Steamship Co., 5 Blatch., 525.

<sup>3</sup> Reed v. Jones, 6 Wis., 680.

<sup>4</sup> Hartt v. Harvey, 32 Barb., 55.

And see Mickles v. Rochester City Bank, 11 Paige, 118; People v. Conklin, 5 Hun, 452; Wilkie v.

ground of fraud sufficient to warrant a departure from the rule, or to justify a court of equity, in such case, in granting relief by injunction.<sup>1</sup> Indeed, the only ground upon which the jurisdiction of equity in restraint of corporate elections can be properly based is the protection of the property rights of shareholders, and it is believed that the limit to the exercise of the jurisdiction is found in such measure of preventive relief as will prevent injury to those property rights, without extending it to questions of title to corporate offices, the determination of which is to be sought in a legal rather than in an equitable forum.

Rochester & S. L. R. Co., 12 Hun, 61 Ga., 86; *Harris v. Pounds*, 64 242; *Sherman v. Clark*, 4 Nev., Ga., 121.

138. See also *Hussey v. Gallagher*, <sup>1</sup>*Hartt v. Harvey*, 32 Barb., 55.

## CHAPTER XXI.

### OF INJUNCTIONS PERTAINING TO MUNICIPAL CORPORATIONS.

I. NATURE AND GROUNDS OF THE JURISDICTION . . . . .	§ 1236
II. MUNICIPAL IMPROVEMENTS . . . . .	1270
III. MUNICIPAL-AID SUBSCRIPTIONS . . . . .	1282
IV. PARTIES . . . . .	1298

#### I. NATURE AND GROUNDS OF THE JURISDICTION.

- § 1236. The jurisdiction founded in trust.
1237. Misappropriation of municipal funds enjoined.
1238. The doctrine illustrated.
1239. Further illustrations.
1240. Discretion of municipal officers not interfered with; illustrations of the doctrine.
1241. Distinction between acts within corporate powers and acts *ultra vires*.
1242. Remedy at law; revocation of license; license on occupations.
1243. Municipal legislation not enjoined, but illegal acts thereunder may be.
1244. Suits, arrests or fines for violation of ordinances not enjoined.
1245. Ordinance for landing of boats at wharf.
1246. Passage of ordinance concerning municipal improvements not enjoined.
1247. Proceedings under ordinance in excess of power enjoined.
1248. Ordinances concerning nuisances.
1249. Invalidity of municipal organization.
1250. Injunction not granted against municipal election.
1251. Letting contracts to lowest bidder.
1252. The same.
1253. Selection of newspaper for publication of official proceedings.
1254. Annexation of territory to municipality.
1255. Making contract within municipal authority not enjoined; otherwise when contract illegal.
1256. Right must be clear; authority or title of officers not determined by injunction.
1257. Removal of county seat.
1258. The same.

- § 1259. Improper application to parliament enjoined.  
 1260. Failure to invoke remedy at law.  
 1261. Organization of municipalities not enjoined.  
 1262. Municipality enjoined from incurring debts in excess of constitutional limit.  
 1263. Misapplication of school funds; removal of school house.  
 1264. Interference with receiver.  
 1265. Theatrical entertainment without license.  
 1266. Denial of right of appeal.  
 1267. Employment of additional counsel by city.  
 1268. Holder of county order and city bond.  
 1269. Use of school house for other than school purposes enjoined.

§ 1236. The jurisdiction of courts of equity to restrain the proceedings of municipal corporations, at the suit of citizens and tax payers, where such proceedings encroach upon private rights and are productive of irreparable injury, may be regarded as well established.<sup>1</sup> In the exercise of this jurisdiction the courts proceed upon substantially the same principles which govern their interference in cases of trusts, a municipal corporation being regarded in equity as charged with and made the depositary of a public trust, and thus amenable to the jurisdiction of equity for a breach of that trust.<sup>2</sup> Thus, a city government, being a municipal corporation entrusted with the care of the city property, if it disposes of property, or grants privileges or franchises, without consideration and with no profit to the city, where a proper disposition of such privileges would inure largely to the benefit of the city, such a breach of trust is committed as calls for the interposition of equity by injunction.<sup>3</sup> And when an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and tax payers, a court of equity is warranted in interfering by injunc-

<sup>1</sup> *Christopher v. Mayor*, 13 Barb., B. Mon., 610; *Lutes v. Briggs*, 5 667; *Milhau v. Sharp*, 15 Barb., Hun, 67.

193; *Stuyvesant v. Pearsall*, Ib., <sup>2</sup> *Milhau v. Sharp*, 15 Barb., 193; 244; *Lumsden v. Milwaukee*, 8 *Stuyvesant v. Pearsall*, Ib., 244.

Wis., 485; *Smith v. Appleton*, 19 <sup>3</sup> *Milhau v. Sharp*, 15 Barb., 193; Wis., 468; *Dudley v. Trustees*, 12 *Stuyvesant v. Pearsall*, Ib., 244.

tion for the prevention of such act.<sup>1</sup> In such case a more prompt and efficacious remedy is demanded than is afforded by the tardy action of courts of law, and equity alone can administer the necessary relief by the exercise of its extraordinary power by injunction.

§ 1237. The most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or unauthorized diversion of public funds belonging to the municipality. The foundation of the relief which is invoked in cases of this nature rests in the doctrine of trusts, and the relief is freely granted in aid of citizens and tax payers, as to whom the officers of the municipality sustain the relation of trustees. And while courts of equity are averse to any interference with the proceedings of municipal officers while acting within the scope of their authority, and while they will not by injunction control the judgment or revise the action of municipal bodies in matters resting within their own well defined jurisdiction, they will yet relieve in behalf of citizens and tax payers against illegal action on the part of such bodies, without authority of law and in excess of the corporate powers. An injunction will, therefore, lie to restrain an illegal diversion, or a misappropriation of the public funds to purposes unauthorized by law, the action of the municipal authorities in making such appropriation being regarded both in the nature of a breach of their official and public trust, and also as wholly void.<sup>2</sup> So under

<sup>1</sup> *Christopher v. Mayor*, 13 Barb., 567; *Hays v. Jones*, 27 Ohio St., 218; *Davenport v. Kleinschmidt*, 6 Mont., 502. But in California it is held that a board of county supervisors will not be enjoined at the suit of a tax payer from erecting a building for which they have no authority, since the act being illegal and unauthorized, plaintiff can not be injured thereby, and an expenditure for an unauthorized

work, if made, can not become a charge upon his property. *Linden v. Case*, 46 Cal., 171. And it is held, upon the same ground, that a tax payer can not enjoin a board of county supervisors from auditing and allowing fraudulent claims against a county. *Merriam v. Board of Supervisors*, 72 Cal., 517.

<sup>2</sup> *Lutes v. Briggs*, 5 Hun, 67; *Roberts v. Mayor*, 5 Ab. Pr., 41; *Sherlock v. Village of Winnetka*,

a statute authorizing a tax payer to maintain an action to restrain any illegal official act upon the part of municipal officers, a town officer may be enjoined from appropriating to his own use, out of the funds of the town in his possession, the amount of certain fees claimed by him, but which have not been audited or allowed by the proper officers in accordance with the laws of the state.<sup>1</sup>

§ 1238. Illustrations of the doctrine as thus stated are manifold, but the governing principle underlying them all is one and the same. Thus, an appropriation by a board of county commissioners of the county funds in aid of a private corporation, which is made without authority of law and which is therefore void, may be enjoined at the suit of a tax payer.<sup>2</sup> So a donation of public funds by a board of county commissioners, without legal authority, in aid of the erection of a school house, will be restrained upon a bill by citizens and tax payers of the county.<sup>3</sup> So where a town has voted to loan its surplus revenue in an illegal and unauthorized manner, its trustees may be enjoined from compliance with such vote.<sup>4</sup> And upon a bill by citizens and tax payers it is proper to enjoin, until a final hearing upon the merits, the payment of county bonds which are alleged to have been issued without authority of

- 59 Ill., 389; S. C. upon final hearing, 68 Ill., 530; *Patton v. Stephens*, 14 Bush, 324; *Brown v. Concord*, 56 N. H., 375; *Dent v. Cook*, 45 Ga., 323; *Hudson v. Mayor*, 64 Ga., 286; *White v. Commissioners*, 13 Oregon, 317; *Crampton v. Zabriskie*, 101 U. S., 601; *Delano Land Company's Appeal*, 103 Pa. St., 347; *Peter v. Prettyman*, 62 Md., 566; *Hospers v. Wyatt*, 63 Iowa, 264; *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30; *Rothrock v. Carr*, 55 Ind., 334; *Colton v. Hanchett*, 13 Ill., 615; *Perry v. Kinnear*, 42 Ill., 160; *Jacksonport v. Watson*, 33 Ark., 704; *Austin v. Coggeshall*, 12 R. I., 329. See also *Tash v. Adams*, 10 Cush., 252. And see *Beauchamp v. Board of Supervisors*, 45 Ill., 274; *Schumm v. Seymour*, 9 C. E. Green, 143; *English v. Smock*, 34 Ind., 115; *State v. Commissioners*, 39 Ohio St., 58.
- <sup>1</sup> *Warrin v. Baldwin*, 105 N. Y., 534.
- <sup>2</sup> *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30.
- <sup>3</sup> *Rothrock v. Carr*, 55 Ind., 334.
- <sup>4</sup> *Pope v. Inhabitants of Halifax*, 12 Cush., 410.

law in aid of the building of a jail.<sup>1</sup> So the misappropriation of funds by the common council of a village, in the purchase of lands and the erection of buildings thereon for private purposes, constitutes such a breach of trust as to entitle tax payers to relief by injunction.<sup>2</sup> And an illegal expenditure of public funds by a municipal corporation in payment of counsel fees in a proposed litigation may be enjoined, such expenditure being entirely beyond the power of the corporate authorities.<sup>3</sup> Upon similar principles equity may enjoin an illegal and unauthorized appropriation of public money by a municipality, such as the payment of a reward for the apprehension of a defaulting city official and expenses incurred in procuring his arrest and extradition from a foreign country.<sup>4</sup> So where money which has been properly and legally assessed and collected for a lawful purpose is diverted to a purpose foreign to that for which it was intended, equitable relief may properly be extended. Thus, when money has been raised for the improvement of streets by assessment upon the property owners benefited thereby, but the municipal authorities are proceeding to appropriate it for a purpose not warranted by the ordinance authorizing the improvement and making the assessment, property owners who have been assessed for the improvement may be relieved by injunction against such misappropriation.<sup>5</sup> And when, pursuant to an act of legislature, a fund has been collected by taxation and set apart for the payment of interest on certain city bonds, it becomes a trust fund for that purpose and its unauthorized diversion to another and different purpose may be enjoined at the suit of the bondholders.<sup>6</sup> So if a municipal corporation is about to accept and pay for a work of

<sup>1</sup> *Dent v. Cook*, 45 Ga., 323.

<sup>5</sup> *Lutes v. Briggs*, 5 Hun, 67.

<sup>2</sup> *Sherlock v. Village of Winnetka*, 59 Ill., 389; *S. C.* upon final hearing, 68 Ill., 530.

<sup>6</sup> *Maenhaut v. New Orleans*, 2 Woods, 108; *Ranger v. New Orleans*, 2 Woods, 128; *Chaffraix v. Board of Liquidation*, 11 Fed. Rep., 638.

<sup>3</sup> *Roberts v. Mayor*, 5 Ab. Pr., 41.

<sup>4</sup> *Patton v. Stephens*, 14 Bush, 324.



public improvement, which in substantial and important respects is not in accordance with the contract, the difference inuring to the benefit of the contractor at the expense of property owners, the officers of the corporation are guilty of a breach of trust amounting to a fraud, the appropriate remedy for which is an injunction to restrain such payment.<sup>1</sup>

§ 1239. So, also, if a board of county supervisors have acted illegally and fraudulently in auditing and allowing claims in their own favor, and warrants have been drawn upon the county treasurer for their payment, the payment of such warrants may be enjoined at the suit of a tax payer, it being averred that defendants conspired together to defraud the county by presenting and allowing fraudulent claims for pretended services.<sup>2</sup> And where the supervisors of a county are attempting to misapply the county funds, an injunction is the proper remedy to prevent their action.<sup>3</sup> So where the authorities of a county attempt to appropriate and pay to a judge, as a mere gratuity, any portion of the county funds, such appropriation not being authorized by law, an injunction will be allowed to prevent its payment. And where, for the purpose of evading the injunction, the supervisors rescind the first order appropriating the money, and pass a second one to effect the same result, a supplemental bill and injunction will not be required, since the first injunction covers the entire case.<sup>4</sup>

<sup>1</sup> Schumm v. Seymour, 9 C. E. Green, 143; Carthan v. Lang, 69 Iowa, 384.

<sup>2</sup> Andrews v. Pratt, 44 Cal., 309.

<sup>3</sup> Colton v. Hanchett, 13 Ill., 615.

<sup>4</sup> Perry v. Kinnear, 43 Ill., 160. And see Beauchamp v. Board of Supervisors, 45 Ill., 274. Walker, Chief Justice, pronouncing the opinion of the court in Perry v. Kinnear, says: "In the absence of some law authorizing the performance of the act, the board has no

power to make such an appropriation. And being unauthorized and illegal, its consummation should have been restrained. By an unauthorized tax the citizen is deprived of his property without sanction of law. And bodies created for the discharge of public duties, and to aid in conducting the affairs of counties, have not been intrusted with the power to seize and appropriate the property of the people to any but legal pur-

So tax payers of a school district may enjoin the collection of a tax for the payment of a judgment which has been obtained against the district by fraud and collusion with its officers.<sup>1</sup> So municipal officers may be enjoined at the suit of tax payers from appropriating the funds of the municipality for celebrations or entertainments, in the absence of any lawful authority to devote the funds to such uses.<sup>2</sup>

§ 1240. An important modification of the doctrine of equitable interference with the proceedings of municipal corporations is found in the limitations and restrictions which are placed upon the jurisdiction in all cases where it is sought to interfere with or control the judgment or discretion of municipal bodies upon matters properly entrusted to them by law. A municipal corporation being a political body, clothed with certain legislative and discretionary powers, equity is ordinarily averse to interfering by injunction with the exercise of those powers at the suit

posés. The inhabitants of the state have been secured in the possession and enjoyment of their property against as well the officer created by law as private persons. The former can only exercise power to deprive him of it, in the mode and for the purposes constitutionally authorized by law. If his property may be seized for one illegal purpose it may for another, and all protection ceases. The power to levy and collect taxes is a power to take from the citizen his money, with or without his consent, and when it is attempted to exercise such a power, courts will not hesitate to afford preventive relief. And, as this was an attempt to exercise unauthorized powers and wrongfully to appropriate the money of the citizens of the county, the court below should have overruled the motion to dis-

solve the injunction. And for this error the decree of the court below must be reversed and the cause remanded."

<sup>1</sup> *Nevil v. Clifford*, 55 Wis., 161.

<sup>2</sup> *Austin v. Coggeshall*, 12 R. I., 329; *Tash v. Adams*, 10 Cush., 252. And in *Austin v. Coggeshall*, 12 R. I., 329, it is held that laches of the tax payer in seeking relief in such case is no bar to an injunction, since the municipal officers are plainly exceeding their authority in making the appropriation, and all persons dealing with them are presumed to know the limitations upon their authority, and hence to act at their peril. But a contrary doctrine is held in *Tash v. Adams*, 10 Cush., 252. See, also, upon the question of laches, *Fuller v. Inhabitants of Melrose*, 1 Allen, 166.

of a private citizen. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.<sup>1</sup> And the fact that the court would have exercised the discretion in a different manner will not warrant it in departing from the rule. Thus, a mere difference of opinion between a court of equity and a municipal corporation as to the proper rate of ferriage to be charged, where the corporation is by its charter vested with the control of certain ferries, and, as incidental thereto, the right of establishing a tariff of prices, will not justify the court in granting an injunction.<sup>2</sup> And when it is made by law the duty of the board of supervisors of a county to build a jail for the use of the county, and the board are proceeding in good faith in the discharge of that duty, they will not be enjoined at the suit of a tax payer when it is not alleged that they are acting in excess of their powers, and when no fraud or unfair dealing is shown. In such a case equity is averse to interfering by injunction, since the judicial authority has no power to interfere with other departments of the government while acting within the scope of their lawful authority.<sup>3</sup> Nor will the discretion of the common council of a city in matters pertaining to their legislative functions be controlled by the writ of injunc-

<sup>1</sup> *Kelsey v. King*, 32 Barb., 410; *Fitzgerald v. Harms*, 92 Ill., 372; *People v. Mayor*, *Id.*, 102; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. (2 Stew.), 164; *Lane v. Morrill*, 51 N. H., 422; *People v. Lowber*, 7 Ab. Pr., 158; *Andrews v. Knox Co.*, 70 Ill., 65; *Ely v. City of Rochester*, 26 Barb., 133; *Swett v. City of Troy*, 62 Barb., 630; *S. C.*, 12 Ab. Pr. N. S., 100; *Phelps v. City of Watertown*, 61 Barb., 121;

*Wiley v. Board of Commissioners*, 51 Md., 401; *Featherston v. Small*, 77 Ind., 143; *Marshall v. Gill*, 77 Ind., 402; *Argo v. Barthand*, 80 Ind., 63. See also *Mayor v. Weatherby*, 52 Md., 442; *Kelly v. Mayor*, 53 Md., 134; *Mayor v. Eldridge*, 64 Ga., 524.

<sup>2</sup> *People v. Mayor*, 32 Barb., 102.

<sup>3</sup> *Andrews v. Knox Co.*, 70 Ill., 65.

tion. Hence the action of such a body in authorizing a purchase of lands, if within the powers conferred upon them by their charter, will not be enjoined because improvident, or because of the payment of an exorbitant price, in the absence of any allegations of fraud.<sup>1</sup> So a court of equity will not interfere by injunction with the exercise of the judgment and discretion of a board of municipal officers such as a city council, in the selection of rooms for the use of the city officers, and in issuing city scrip in advance for the payment of rent for such rooms.<sup>2</sup> And where municipal officers are proceeding in the exercise of an unquestioned authority with the construction of a work of public convenience, they will not be enjoined at the suit of a citizen seeking to restrain the work upon the particular plan proposed, upon the ground that another and different plan is superior. Thus, the owners of mills and mill privileges upon a river in an incorporated city will not be permitted to enjoin the city authorities from improving or reconstructing a public bridge in accordance with a proposed plan, upon the ground that the plan adopted will cause more injury to complainant's mills than would otherwise accrue; since the power to make the improvement necessarily implies the right to determine upon the plan and method of doing it.<sup>3</sup> And where, by the provisions of its charter, general authority is conferred upon a city to establish and regulate markets and market places, the corporate officers will not, in the absence of any threatened abuse of corporate authority, be enjoined from removing a market house, and tax payers, as such, have no sufficient ground for preventing the removal by injunction, whatever rights adjacent proprietors and others injuriously affected may have.<sup>4</sup>

§ 1241. But the restrictions thus placed upon equitable

<sup>1</sup> *People v. Lowber*, 7 Ab. Pr., 158. 62 Barb., 630; S. C., 12 Ab. Pr. N.

<sup>2</sup> *Moses v. Risdon*, 46 Iowa, 251. S., 100.

<sup>3</sup> *Ely v. City of Rochester*, 26 Barb., 133; *Swett v. City of Troy*, 563. <sup>4</sup> *Gall v. Cincinnati*, 18 Ohio St.,

interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power, but are limited to cases of a conceded jurisdiction, within the bounds of which the municipal power is acting. And while, as is thus shown, equity will not enjoin the action of municipal corporations while proceeding within the limits of their well defined powers as fixed by law, it has undoubted jurisdiction to restrain them from acting in excess of their authority and from the commission of acts which are *ultra vires*.<sup>1</sup> In illustration of this doctrine, where by act of parliament certain lands are directed to be put and kept in proper condition for purposes of public recreation, the municipal authorities having them in charge may be perpetually enjoined from devoting the lands to another and different purpose foreign to that contemplated, as the holding of a cattle fair, such act being entirely beyond the powers conferred upon them by law.<sup>2</sup> And where a municipal body, such as a board of works, entrusted with certain powers for the attainment of certain results, are proceeding in excess of their powers to pull down complainant's buildings, they may be restrained by injunction, their action being *ultra vires*.<sup>3</sup>

§ 1242. The fundamental doctrine which has been so frequently stated and illustrated in the preceding chapters, denying relief by injunction in cases where adequate relief may be had at law, is equally applicable to that branch of the jurisdiction under discussion, and courts of equity will not restrain the action of municipal officers when the persons aggrieved by such action have a full and complete remedy at law.<sup>4</sup> In conformity with this general principle,

<sup>1</sup> *Frewin v. Lewis*, 4 Myl. & Cr., 249; *Attorney-General v. Aspinall*, 2 Myl. & Cr., 613; *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch., 597; *Attorney-General v. Mayor*, 1 Gif., 363.

<sup>2</sup> *Attorney-General v. Mayor*, 1 Gif., 363.

<sup>3</sup> *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch., 597.

<sup>4</sup> *Gaertner v. City of Fond du*

a board of county supervisors will not be enjoined from dismissing an employe, who is acting under a contract with such board, since if the contract be valid the remedy at law is ample and complete, and equity, therefore, has no jurisdiction.<sup>1</sup> So the action of a board of county commissioners in regard to the building of a court house will not be enjoined when a plain and adequate remedy is provided by law for all persons aggrieved by the action of such commissioners.<sup>2</sup> And a court of equity will not grant an injunction against municipal officers whose threatened acts may be corrected by *certiorari* in a court of law.<sup>3</sup> So the fact that the common council of a city have revoked plaintiff's license to sell liquors, without cause and without notice to him or opportunity to be heard, and that he is threatened with arrest and the consequent destruction of his business, will not warrant relief in equity by injunction, and plaintiff will be remitted to his legal remedy.<sup>4</sup> But a city may enjoin persons from transacting business until they have paid a license tax imposed upon occupations;<sup>5</sup> and such persons are not entitled to enjoin the city from collecting the license.<sup>6</sup>

§ 1243. The question of equitable interference by injunction with the legislative action of municipal bodies has given rise to some apparent conflict of authority and is not wholly free from doubt. It is believed, however, that the authorities bearing upon this subject may be reconciled by

Lac, 34 Wis., 497; *Thomas v. Supervisors*, 56 Ill., 351; *Wood v. Bangs*, 1 Dakota, 179; *Kelsey v. King*, 32 Barb., 410.

<sup>1</sup> *Thomas v. Supervisors*, 56 Ill., 351.

<sup>2</sup> *Wood v. Bangs*, 1 Dakota, 179.

<sup>3</sup> *Gaertner v. City of Fond du Lac*, 34 Wis., 497; *Kelsey v. King*, 32 Barb., 410.

<sup>4</sup> *Gaertner v. City of Fond du Lac*, 34 Wis., 497.

<sup>5</sup> *City of New Orleans v. Becker*,

31 La. An., 644; *Wells v. City of New Orleans*, 32 La. An., 676. And the relief was granted in the latter case, notwithstanding the city had been enjoined by the defendant, a saloon keeper, from interfering with his business and collecting such license, the injunction having only the effect of preventing the city from interfering by extra-judicial proceedings.

<sup>6</sup> *City of New Orleans v. Becker*, 31 La. An., 644.

the application of certain fundamental distinctions which lie at the foundation of the jurisdiction of equity over the action of municipal bodies. In the first place, it is unquestionably true that purely legislative acts, such as the passage of resolutions, or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere with the proceedings of municipal bodies in matters resting within their jurisdiction, or to control in any manner the exercise of their discretion. A distinction, however, is properly drawn between the case of restraining an illegal act attempted under the authority and sanction of a municipal body, and restraining the corporation itself from granting such authority. And while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, yet after the passage of such ordinances or resolutions the courts may and will, on a proper case being shown, prevent their enforcement, and for this purpose may enjoin proceedings thereunder which would otherwise result in irreparable injury.<sup>1</sup> And when the property or money of the corporation is endangered by illegal proceedings of municipal officers, acting under a city ordinance which is repugnant to the charter and, therefore, inoperative and void, relief by injunction may be allowed.<sup>2</sup> So the enforcement of a city ordinance which is found to be unconstitutional and void, whereby a debt is sought to be imposed upon a city, affords sufficient ground for an injunction in behalf of tax payers.<sup>3</sup> But to warrant the relief in any case it must appear that the acts com-

<sup>1</sup> *Whitney v. Mayor*, 28 Barb., 233; *People v. Mayor*, 32 Barb., 35; S. C., 9 Ab. Pr., 253; *People v. Lowber*, 7 Ab. Pr., 158; *People v. Mayor*, 10 Ab. Pr., 144; *Carter v. City of Chicago*, 57 Ill., 283; *Mayor v. Gill*, 31 Md., 375; *Cincinnati S. R. Co. v. Smith*, 29 Ohio St., 291; *Mitchell v. Wiles*, 59 Ind., 364; Al-

pers *v. San Francisco*, 12 Sawy., 631; *Harrison v. City of New Orleans*, 33 La. An., 222; *Spring Valley Water Works v. Bartlett*, 8 Sawy., 555; S. C., 16 Fed. Rep., 615. See *Meredith v. Sayre*, 32 N. J. Eq., 557.

<sup>2</sup> *Mitchell v. Wiles*, 59 Ind., 364.

<sup>3</sup> *Mayor v. Gill*, 31 Md., 375.

plained of are of such a character that full and adequate redress can not be had at law.<sup>1</sup> And equity will not interfere to prevent the enforcement of a city ordinance simply on the ground of its illegality, nor will it assume jurisdiction to question the lawful election of officers, or the validity of the ordinance *per se*, for the purpose of protecting citizens from an uncertain and remote injury.<sup>2</sup> And since a court of chancery has no jurisdiction over matters of a political character, and can not determine controversies concerning the title to public offices, it will not enjoin a board of municipal officers from the enforcement of an ordinance properly falling within their legislative functions, upon the ground that its enforcement would deprive complainants of their right to exercise the functions of certain public offices which they hold.<sup>3</sup>

<sup>1</sup> *Gartside v. East St. Louis*, 43 Ill., 47; *Torpedo Co. v. Borough of Clarendon*, 19 Fed. Rep., 231.

<sup>2</sup> *Kearney v. Andrews*, 2 Stockt., 70. This was a bill to restrain the enforcement of certain ordinances for altering the grade of streets, on the ground of their illegality. Williamson, Chancellor, says: "These complainants claim the protection of the court because 'they are holders of real estate in said city, and the situation and value of the property of each of them is directly involved in the said proceeding going on and threatened; and because, in most cases, the proceedings going on are really useless, and will tend to depreciate their property in value.' If the court can interfere on these grounds, then the owner of land within the jurisdiction of a municipal corporation may question, in this court, the validity of any ordinance of the corporate authorities respecting any real estate within its limits,

because the value of his property may be affected by it. This would be assuming a jurisdiction to try the lawful election of officers and the validity of ordinances of corporate bodies upon too slight grounds. How are 'the situation and value of the property of each of these complainants directly involved in these proceedings?' The mere allegation, amounting to a speculative opinion only of these complainants, is not sufficient for the court to act upon. The injury must be specified, and so pointed out that the court can see it must be an inevitable consequence of the act threatened and complained of." But see *Wood v. Brooklyn*, 14 Barb., 425, where it is held that the enforcement by a municipal corporation of an ordinance which is in violation of the laws of the state, and therefore void, may be enjoined.

<sup>3</sup> *Sheridan v. Colvin*, 78 Ill., 237.



§ 1244. It necessarily follows from the doctrines as above stated and illustrated that when municipal ordinances have been enacted by the proper authority, proceedings on the part of municipal officers for their enforcement, as by suits, arrests, or fines, will not be enjoined merely because of the alleged illegality of the ordinances, or for the purpose of awaiting a determination of the question of their validity, when the person aggrieved may have a full and adequate remedy at law.<sup>1</sup> A court of equity will not,

<sup>1</sup> *West v. Mayor*, 10 Paige, 539; *Cohen v. Commissioners of Goldsboro*, 77 N. C., 2; *Burnett v. Craig*, 30 Ala., 135; *Devron v. First Municipality*, 4 La. An., 11; *Levy v. City of Shreveport*, 27 La. An., 620. See also *Gartside v. East St. Louis*, 43 Ill., 47; *Davis v. American Society*, 6 Daly, 81; *Garrison v. City of Atlanta*, 68 Ga., 64; *Poyer v. Village of Des Plaines*, 123 Ill., 111. *West v. Mayor*, 10 Paige, 539, is a leading case upon the subject under discussion. It was an application by defendants for the dissolution of an injunction restraining them from prosecuting suits against complainants, their agents or servants, for breaches of city ordinances relative to the weighing of coal. Walworth, Chancellor, observes: "The question as to the validity of the corporation ordinances does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants or those in their employ liable for the penalty. And it would be a usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. In the case of *Oakley v. The Mayor*, etc., of New York, decided in April, 1840, which was a bill for an injunction to restrain the prosecution of suits at law under the market ordinances, I decided that if the objections to the legality of those ordinances were well taken the complainant had a perfect defense at law, and that this court would not grant an injunction to protect him against a multiplicity of suits, until his right to such protection had been established by a successful defense at law in some of the suits. See *Eldridge v. Hill*, 2 John. Ch. Rep., 281. In the present case the complainants' bill does not show that they have established their right at law; but, on the contrary, it is distinctly stated in the bill that in some of the suits which have been commenced the decision has been adverse to the complainants, and that the other suits have not yet been decided. It is true they complain that in this case the court decided the law against them, but did not submit the legality of the ordinances to the jury to be decided as a matter of fact, and that they intend to carry the question as to such legality before a higher

therefore, interfere by injunction to restrain municipal officers from prosecuting suits against complainants, or from interfering with their business because of their violation of municipal ordinances which are alleged to be illegal, since the question of the validity of such ordinances does not properly pertain to a court of equity when complainants have a perfect remedy at law, if the ordinances are invalid, by an action to recover damages for the injury sustained.<sup>1</sup> So municipal officers will not be enjoined from collecting fines imposed upon complainant for the violation of a municipal ordinance until the validity of the ordinance shall have been determined by proceedings at law in the nature of a *quo warranto* instituted by complainant, since an injunction will not lie to prevent a prosecution either of a criminal or a *quasi* criminal nature. And if, in such case, defendants are proceeding without authority of law to impose fines and imprisonment, they are mere trespassers, and the remedy should be sought at law.<sup>2</sup> Nor will an action for an injunction be entertained to test the authority of the mayor of a city to arrest and fine complainants for carrying on a business in contravention of the city ordinances, and to test the legality of such ordinances, the proper remedy being by appeal from the judgments imposing the penalties prescribed by the ordinances.<sup>3</sup> And an injunction will not be granted to restrain the prosecution of suits before justices of the peace for violations of city ordinances, when complainant may test the legality and validity of the ordinances by a direct appeal from the decision of the justices.<sup>4</sup> So where a society is duly incorporated for the

tribunal for a decision. But neither of these circumstances can give jurisdiction to this court to interfere before the right of complainants is established by such higher tribunal. And if they are successful there, it is not probable that the interference of this court will be necessary."

<sup>1</sup> *West v. Mayor*, 10 Paige, 539; *Cohen v. Commissioners of Goldsboro*, 77 N. C., 2.

<sup>2</sup> *Burnett v. Craig*, 30 Ala., 135.

<sup>3</sup> *Levy v. City of Shreveport*, 27 La. An., 620.

<sup>4</sup> *Devron v. First Municipality*, 4 La. An., 11.

prevention of cruelty to animals, and its agents are empowered to make arrests within a given city or county for violating an act of legislature making cruelty to animals a misdemeanor, an injunction will not lie to prevent such agents from making arrests for violations of the law. And in such case the relief is properly refused upon the ground that if the act is unconstitutional and confers no power to make the arrest, or if the arrest under the statute is itself unjustifiable or unlawful, the remedy at law by an action for damages is the appropriate means of relief, and there is, therefore, no ground for the interference of equity by injunction.<sup>1</sup> But an injunction has been held to be the appropriate remedy to prevent a city from repeatedly prosecuting a citizen for violating a city ordinance prohibiting any person from holding possession of any streets or commons of the city, when plaintiff asserts title to the premises in controversy, the relief being allowed until the disputed question of title can be determined.<sup>2</sup>

§ 1245. It is also held that where the municipal authorities of a town have authorized certain persons to erect and maintain a wharf for the landing of vessels, such persons are not entitled to an injunction to restrain the municipal officers from enforcing a subsequent ordinance requiring all boats arriving in port to land at a public landing kept by the town unless permission be obtained to land elsewhere. And equitable relief is properly refused in such case upon the ground that such an exercise of authority upon the part of the municipality is not subject to revision or control by the writ of injunction.<sup>3</sup>

§ 1246. A court of equity will not interfere by injunction with the exercise of the legislative power vested by law in inferior municipal bodies, such as the authority of the common council of a city over public improvements in

<sup>1</sup> Davis v. American Society, 6 Daly, 81.

<sup>2</sup> Shinkle v. City of Covington, 83 Ky., 420.

<sup>3</sup> Brown v. Trustees of Catlettsburg, 11 Bush, 435.

the city. It will not, therefore, enjoin such council from the passage of an ordinance seeking to repeal a prior ordinance authorizing the erection of gas works and their operation by plaintiffs for a given term of years, since this would be an interference by the judicial with the legislative power of the government, the act of the council in such case being legislative in its nature. And the fact that the ordinance which it is sought to repeal is claimed to be a contract giving an exclusive franchise to plaintiffs does not warrant an injunction in such case against the legislative act of the council.<sup>1</sup> So equity will not enjoin a city council from the passage of an ordinance vacating certain streets in the city, there being ample remedy at law by *certiorari*.<sup>2</sup>

§ 1247. In determining the right to preventive relief against the enforcement of municipal ordinances, a distinction has been drawn between cases where the municipal authorities are acting within the limits of the powers conferred upon them by law, and cases where they are guilty of a plain departure from such powers. And while, in the former class of cases, equity will not interfere with the exercise of a public or political power vested in the officers of a city government, in the latter class relief may be allowed. And where the authorities of a city, acting from fraudulent and malicious motives, attempt to enforce a city ordinance whereby it is sought to appropriate to the public use for a street so much of one side of the street as will deprive the adjacent owners of any sidewalk, an injunction may properly be allowed.<sup>3</sup> So it has been held that the common council of a city may be enjoined from enforcing an illegal ordinance or order for the vacation of a street, which has been made without the necessary consent of the requisite number of property holders.<sup>4</sup> And it is held that proceedings by a municipal corporation under an ordinance which is entirely void may be restrained.<sup>5</sup>

<sup>1</sup> *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505.

<sup>2</sup> *Stubenrauch v. Neyenesch*, 54 Iowa, 587.

<sup>3</sup> *Carter v. City of Chicago*, 57 Ill., 283.

<sup>4</sup> *Spiegel v. Gansberg*, 44 Ind., 418.

<sup>5</sup> *Mayor v. Radecke*, 49 Md., 217.

§ 1248. Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining a certain act, unless the act is shown to be a nuisance *per se*.<sup>1</sup> And where a body of commissioners, as a board of health, appointed by the executive power of the state, and having no authority for exercising the powers of local legislation, attempt by an ordinance to abate as a nuisance that which is not a nuisance at common law, their proceedings may be enjoined.<sup>2</sup>

§ 1249. Courts of equity have no jurisdiction, independent of statute, to enjoin at the suit of citizens the proceedings of county officers because of the illegality of the act creating such county, when no question of private right is involved, since the state itself is the only party to institute proceedings to test the franchise of a municipality, the appropriate remedy for that purpose being by proceedings in *quo warranto*. And where a court of equity powers has nevertheless entertained jurisdiction and enjoined county officers from exercising their functions upon the ground of the invalidity of the law creating the county, it may be prevented by the writ of prohibition from proceeding with the cause.<sup>3</sup> Nor is an injunction the appropriate remedy to test the legality of the organization of a municipality, or to prevent its officers from acting upon the ground that it is not properly organized, and the parties aggrieved will be left to their remedy at law by proceedings in *quo warranto*.<sup>4</sup>

<sup>1</sup> *Mayor v. Thorne*, 7 Paige, 261; *Village of St. Johns v. McFarlan*, 33 Mich., 72. In *Mayor v. Thorne*, an injunction was dissolved which had been granted at the instance of a city against certain parties for violation of an ordinance prohibiting the manufacture of pressed hay.

<sup>2</sup> *Schuster v. Metropolitan Board of Health*, 49 Barb., 450.

<sup>3</sup> *Henry v. Steele*, 28 Ark., 455. But in Pennsylvania it has been

held that where two different bodies were attempting, under claim of right, to act as the common council of a city, a preliminary injunction might be granted, upon the ground that the acts in question were contrary to law and prejudicial to the interests of the community, and because no adequate remedy could be had at law. *Kerr v. Trego*, 47 Pa. St., 292.

<sup>4</sup> *MacDonald v. Rehrer*, 22 Fla., 198.

§ 1250. A court of equity has no jurisdiction to interfere in disputes concerning municipal elections, and when a court has assumed jurisdiction in such a case and has enjoined a board of municipal officers, such as the common council of a city, from canvassing the returns of a municipal election, which is made their duty by law, such injunction will be regarded as absolutely void for want of jurisdiction over the subject-matter.<sup>1</sup> Nor will a court of equity restrain municipal officers from holding an election merely because of the disorder and confusion which it is feared would result from two contending bodies claiming to be entitled to the government of a city, the appropriate remedy in such case being by proceedings in *quo warranto*.<sup>2</sup>

§ 1251. It not unfrequently happens that municipal officers who are empowered by law to construct works of public improvement, such as public buildings, roads and bridges, are restricted by the terms of their charter, or by other controlling legislation, to the letting of contracts for such works to the lowest responsible bidder, after due advertisement as required by law. And the rule may be regarded as well settled that in all cases where the power to let such contracts is dependent upon conditions and restrictions of this nature, a disregard of, or failure to comply with the necessary conditions constitutes sufficient ground for relief by injunction against the construction of the proposed improvement, or awarding a contract therefor. In such cases, a distinction is properly drawn between the exercise of an unquestioned power over the subject-matter, within whose limits the discretion of municipal bodies will not be interfered with, and an absence or excess of power rendering the action of the municipality void.<sup>3</sup> Where,

<sup>1</sup> Dickey v. Reed, 78 Ill., 261. See also Bynum v. Commissioners of Burke Co., 101 N. C., 412.

<sup>2</sup> Holmes v. Oldham, 1 Hughes, 76.

<sup>3</sup> Schumm v. Seymour, 9 C. E. Green, 143; Commissioners of Ben-

ton Co. v. Templeton, 51 Ind., 266; Follmer v. Nuckolls Co., 6 Neb., 204. And in Commissioners of Benton Co. v. Templeton, 51 Ind., 266, the court, Biddle, C. J., say, p. 269: "While it is quite true that the administrative discretion of the

therefore, municipal officers are required by law to let contracts for the construction of roads or bridges to the lowest competent bidder, they may be enjoined from constructing such works without first advertising for bids and letting the contract to the lowest bidder accordingly.<sup>1</sup> And where the charter of a municipal corporation prohibits the making of contracts for works of public improvement, except after public advertisement of the specifications and proposals for the work in question, a disregard of this requirement of the charter in awarding a contract for such work affords sufficient ground for an injunction at the suit of tax payers, since in such case the municipal authorities are proceeding in excess of their powers, and their contract is, therefore, utterly void. It is also held, in such case, that the inaction and silence of complainants in permitting the work to go on and receiving its benefits will not debar them from the desired relief, the case being one of an illegal assumption of power upon the part of the corporate authorities, and not a case in which they are the representatives of the property owners, acting within the terms of a delegated power.<sup>2</sup> So when a board of county commissioners are empowered by law to let contracts for public buildings after advertisement to the lowest bidder only, and only at the time fixed by such advertisement, they may be enjoined from letting such a contract at a subsequent date without a new advertisement.<sup>3</sup>

§ 1252. Where, however, the charter of a city requires contracts for street improvements to be let to the lowest

board in the business affairs of the county can not be reviewed by a court, yet when the board undertake to do an act unauthorized by law, a court will enjoin them, and this is the proper remedy. Boards have an administrative discretion within the law, but none without or against it."

<sup>1</sup> *Follmer v. Nuckolls Co.*, 6 Neb., 204. See *Crabtree v. Gibson*, 78 Ga., 230.

<sup>2</sup> *Schumm v. Seymour*, 9 C. E. Green, 143.

<sup>3</sup> *Commissioners of Benton Co. v. Templeton*, 51 Ind., 266.

bidder, and the municipal officers advertise for proposals for such work, but only let the contract for a portion of the work specified and for which bids are received, and subsequently contract with the lowest bidder for the residue of the work, equity will not enjoin the collection of an assessment levied for the payment of the work, because no new bids were received for the second contract, but will treat it as a continuation of the original.<sup>1</sup> And when a board of municipal officers are entrusted with unlimited discretion in awarding contracts for public works, and are not required to award them to the lowest bidder, when they have advertised for contracts and have used their best judgment and discretion in the matter, they will not be enjoined by the lowest bidder from contracting with a higher bidder.<sup>2</sup>

§ 1253. While, as has already been shown, courts of equity do not interfere with the discretion and judgment of municipal bodies in matters properly resting in their control, yet when a plain and imperative duty is imposed upon them by law, of a purely ministerial nature, such as the selection of a newspaper for publishing a delinquent tax list, a disregard of such duty affords ground for an injunction, in behalf of a tax payer, to restrain the unauthorized publication of such list.<sup>3</sup> But when a particular newspaper has been designated by the common council of a city for the publication of the official proceedings of the council and city authorities, the publication of such matter being legal and proper in itself, the paper so designated will not be enjoined from such publication by another newspaper claiming to be entitled thereto. And the relief is denied in such case upon the ground that, even if the city authorities are acting in violation of their charter in authoriz-

<sup>1</sup> *Brevoort v. Detroit*, 24 Mich., Board of Fire Commissioners, 55 322. Barb., 288.

<sup>2</sup> *Cleveland F. A. T. Company v.* <sup>3</sup> *Sinclair v. Commissioners of Winona Co.*, 23 Minn., 404.



ing such publication in the paper designated, yet that paper, having no privity with complainant, will not be enjoined from the publication at the suit of the latter.<sup>1</sup>

§ 1254. The question of the power of equity to prevent by injunction the enlargement of the territorial limits of a municipal corporation by the annexation of adjacent territory would seem to be dependent upon the existence of a power in the municipality to make such enlargement, as well as the proper exercise of such power. And where under the laws of the state a board of county commissioners are authorized upon the application of the common council of a city to annex contiguous territory to the city, such legislation being constitutional and the proceedings being found regular, a court of equity will not enjoin the annexation upon the application of a property holder affected thereby.<sup>2</sup> Where, however, the proceedings of a municipal corporation in the annexation of adjacent territory to the municipality are in excess of the corporate power and authority, they may be enjoined at the suit of a citizen and tax payer whose taxes would be increased by the proposed action.<sup>3</sup> So property owners in the territory sought to be annexed, suing in behalf of themselves and all others similarly situated, may enjoin such illegal annexation, both upon the ground of preventing illegal taxation and to prevent a change of the property of citizens from the territorial limits of one municipality or political body to those of another.<sup>4</sup> So when the proceedings by a board of municipal officers for annexing contiguous territory to a city are wholly void, by reason of non-compliance with the statute conferring their jurisdiction, taxes assessed by the city upon the land thus annexed may be enjoined.<sup>5</sup>

<sup>1</sup> *German Printing & Publishing Company v. Illinois Staats Zeitung Company*, 55 Ill., 127.

<sup>2</sup> *Stilz v. City of Indianapolis*, 55 Ind., 515. See also *Graham v. City of Greenville*, 67 Tex., 62.

<sup>3</sup> *Pittsburg's Appeal*, 79 Pa. St., 317; *City of Delphi v. Startzman*, 104 Ind., 343.

<sup>4</sup> *City of Delphi v. Startzman*, 104 Ind., 343.

<sup>5</sup> *Windman v. City of Vincennes*,

And where under the law conferring their authority such officers have no power to annex a portion of the property petitioned for, and are only authorized to grant the prayer of the petition as a whole, the annexation of a part will be treated as void, and the collection of taxes levied by the city upon the part so annexed may be enjoined.<sup>1</sup> And since the property of a municipal corporation is held by it in trust for the public, it may maintain a bill to restrain another municipality from interfering with such property and from exercising jurisdiction within the limits of the plaintiff corporation under proceedings for annexation which are held to be void.<sup>2</sup> But a creditor of a county is not entitled to an injunction to prevent a proposed change in the boundary line of the county, made under an act of legislature which is constitutional, merely because by detaching a part of the county the security for his debt will be altered or impaired.<sup>3</sup>

§ 1255. A municipal corporation will not be enjoined from entering into a contract within the scope of its authority and the purposes for which it was created, in the absence of any legal enactment restricting it from making such contract, and when there is no charge of fraud or improper conduct against the municipal authorities.<sup>4</sup> And since equity has no supervisory power over municipal corporations, or over the acts and proceedings of their officers, it will not interfere by injunction with the action of a municipality in matters of contract when it is not shown that the rights of the citizen seeking the relief have been either injured or menaced in a matter falling under some recognized head of equitable jurisdiction. It will not, therefore, at the suit of a citizen and tax payer, restrain

58 Ind., 480. And see *Town of Cicero v. Williamson*, 91 Ind., 541. But see *South Platte L. Co. v. Buffalo Co.*, 15 Neb., 605.

<sup>1</sup> *City of Peru v. Bearss*, 55 Ind., 576.

<sup>2</sup> *Village of Hyde Park v. City of Chicago*, 124 Ill., 156.

<sup>3</sup> *Moore v. Ballard*, 69 N. C., 21.

<sup>4</sup> *Pullman v. Mayor*, 54 Barb., 169, reversing S. C., 49 Barb., 57. And see *Morris v. Mayor*, 10 C. E. Green, 345.

the authorities of a city from making a contract for street improvements, or from giving drafts in payment for such work, when plaintiff's premises have not been interfered with, and when no assessment has been made or tax levied to meet such payments.<sup>1</sup> Nor can a tax payer enjoin a city from entering into a contract for lighting the streets while a contract with other parties for the same purpose is in force, when plaintiff fails to show that he will sustain any injury by the proposed action of the city authorities.<sup>2</sup> Equity may, however, enjoin a threatened abuse of corporate powers upon the part of municipal officers, in the execution or performance of a contract about to be made by them in behalf of the corporation, in contravention of the laws by which it is governed.<sup>3</sup>

§ 1256. It may be asserted as a general rule that the questions of right involved must be clearly and definitely settled before equity will interfere with the action of municipal bodies; and where the purpose of an injunction is to restrain certain action of the common council of a city, but the right in issue is so indefinite as to be a perpetual source of dispute, and the rights of the corporation would probably be disastrously affected by the injunction, it will not be granted.<sup>4</sup> So when municipal officers, claiming to act under legal authority, assert the right to perform a particular duty in connection with municipal affairs, the only question presented by the bill seeking to enjoin them being the legal question of their authority, and no irreparable injury is shown to result from their assertion of authority, an injunction will be denied, and the parties aggrieved will be left to determine the question of authority by proceedings in *quo warranto*.<sup>5</sup> So, too, when an injunction is sought to restrain defendants from interfering with the teaching

<sup>1</sup> *Phelps v. City of Watertown*, 61 Barb., 121.

<sup>2</sup> *Searle v. Abraham*, 73 Iowa, 507.

<sup>3</sup> *Cincinnati S. R. Company v. Smith*, 29 Ohio St., 291.

<sup>4</sup> *Municipality No. 1 v. Municipality No. 2*, 12 La., 49.

<sup>5</sup> *Brown v. Reding*, 50 N. H., 336.

of a public school by a person alleged to have been properly employed for that purpose, but the controversy involves a determination as to who are officers of the district legally authorized and empowered to act, equity will decline to interfere, the question of title to office being properly determinable in a court of law.<sup>1</sup> And when it is sought to enjoin the erection of public buildings by a municipal corporation, but the effect of the injunction would be to arrest a great public work after a large expenditure of money, equity will not interfere unless in a clear case of abuse of authority by defendants.<sup>2</sup>

§ 1257. An injunction is the appropriate remedy to prevent the removal by county officers of their offices and records, pending the determination of a litigation concerning the removal of the county seat, provided such suit is prosecuted with reasonable diligence. And in such case the fact that a majority of the votes cast at an election called to determine the question of such removal were in the negative affords ground for the injunction.<sup>3</sup> But a board of county commissioners will not be enjoined from re-locating a county seat under legal authority conferred upon them for that purpose, because of frauds alleged to have been practiced upon them in their proceedings, when such grounds could have been urged before final judgment in the proceeding for removal; especially when a long and unreasonable delay has occurred before the application for an injunction.<sup>4</sup> Nor will such removal be enjoined because of irregularities in the election by which it is authorized when adequate remedy is provided by statute for contesting the election.<sup>5</sup> And the existence of such a remedy is also sufficient ground for refusing to enjoin county commissioners from ordering an election to pass upon the question of removal.<sup>6</sup> So when a board of county commissioners are

<sup>1</sup> *District Township v. Barrett*, 47 Iowa, 110.

<sup>2</sup> *Wheeler v. Rice*, 83 Pa. St., 232.

<sup>3</sup> *Shaw v. Hill*, 67 Ill., 455.

<sup>4</sup> *Markle v. Board of Commissioners*, 55 Ind., 185.

<sup>5</sup> *Scott v. McGuire*, 15 Neb., 303.

<sup>6</sup> *Weber v. Timlin*, 37 Minn., 274.

clothed by law with exclusive authority to receive petitions for the removal of the county seat, and to order an election upon the question of removal, and acting within the jurisdiction thus conferred they have received such a petition, passed upon its sufficiency, and ordered the election, no objection being interposed to their action until after such election in which complainants participated, the removal of the county offices to the new location will not be enjoined because of insufficiencies in the petition for relocation.<sup>1</sup> And where the power to pass upon and determine the question of removal of a county seat is conferred by law upon a particular tribunal, as a county court, a court of equity will not review the action of such tribunal upon the question of removal, and will not enjoin the commissioners which it has appointed for that purpose from making the removal.<sup>2</sup>

§ 1258. Upon similar principles, it is held that where a board of county commissioners have jurisdiction over the removal and re-location of a county seat, and have properly acquired jurisdiction of an application for such removal, the presumption in equity will be in favor of the regularity of their proceedings; and although their action may be erroneous or irregular, it can not be attacked in a collateral proceeding, such as a bill to enjoin.<sup>3</sup> And when a county board of supervisors, pursuant to statute, have submitted to a vote of the people the question of a removal of the county seat, the board acting as a *quasi* judicial tribunal to determine preliminary questions, such as the sufficiency of a petition of citizens to submit the question of removal to a vote, their decision will be deemed conclusive when collaterally attacked, and will not be reviewed in equity upon an application to enjoin such removal. In other words, the board having jurisdiction over the subject-matter, equity will not review their proceedings because of

<sup>1</sup> *Ellis v. Karl*, 7 Neb., 381.

<sup>3</sup> *Commissioners of Clay Co. v.*

<sup>2</sup> *Sanders v. Metcalf*, 1 Tenn. Ch., Markle, 46 Ind., 96.

alleged irregularities or errors which might have been corrected at law, nor will it, because of such errors or irregularities, enjoin the proposed action.<sup>1</sup> Nor, in such case, will equity enjoin a board of supervisors from declaring the result of an election called by them upon a petition of citizens to determine the question of removing the county seat.<sup>2</sup> And it has been held that a citizen and tax payer, as such, has not sufficient interest to maintain a bill to enjoin a county officer from removing his office, pending a controversy as to the proper location of the county seat, when he fails to show some special or private interest in the subject-matter, and when he does not sustain the relation of a public officer prosecuting for the benefit of the public.<sup>3</sup>

§ 1259. Equity may interfere by injunction to prevent an abuse of their trust by municipal officers, in making an unauthorized application to parliament for the passage of a bill concerning municipal affairs. And where such officers are proceeding to have a bill introduced in such matter, in disregard of the requirements of their act of incorporation, it is proper upon a bill by tax payers to restrain them from causing the application to be made in their corporate capacity, and from defraying its expenses out of the corporate funds.<sup>4</sup> So an injunction has been allowed to restrain a board of municipal officers from an application to parliament in disregard of a covenant which would be

<sup>1</sup> *Bennett v. Hetherington*, 41 Iowa, 142.

<sup>2</sup> *People v. Board of Supervisors*, 75 Cal., 179.

<sup>3</sup> *McMillen v. Butler*, 15 Kan., 62. See also *Caruthers v. Harnett*, 67 Tex., 127. It has been held in Kansas, where upon proceedings in *mandamus* county officers have been ordered to remove their offices to a new location of the county seat, which has been selected by a vote of the people, but a subse-

quent vote results in the location at another place, that the execution of the former judgment of removal may be enjoined. *Scott v. Paulen*, 15 Kan., 162.

<sup>4</sup> *Attorney-General v. Commissioners of Kingstown*, 1 R. 7 Eq., 383. See also *Attorney-General v. Mayor of Waterford*, 1 R. 9 Eq., 522; *Solicitor-General v. Lord Mayor of Dublin*, 1 L. R. Ir. Ch. D., 166.

virtually annulled and rendered useless by the proposed legislation.<sup>1</sup>

§ 1260. Acquiescence by a tax payer in the construction of a work of public benefit, coupled with a failure to avail himself of a remedy provided by law for redress, will operate as an estoppel when he seeks the extraordinary aid of equity by injunction. Municipal officers will not, therefore, be enjoined from paying for a work of public improvement upon the ground of the invalidity of the contract under which the work has been performed, when the contractor has been permitted to go on under such contract and complete the work, expending a large sum of money in so doing, and when the work has been accepted and thrown open to the public, and complainant, having a plain and adequate remedy at law by appeal from the action of the municipal officers, has failed to avail himself of such remedy.<sup>2</sup>

§ 1261. Equity is averse to interference by injunction with the formation of local governments or municipalities in accordance with law. And where proceedings are being had under the laws of a state for the incorporation of a village, property owners within the proposed village limits will not be permitted to enjoin such organization because the territory in question does not contain the requisite population, or because complainants would thereby be subjected to burdens of local government largely disproportionate to the benefits accruing therefrom, or upon the ground of informality in the proceedings. Nor will the relief be allowed in such case upon the application of the attorney-general, in behalf of the people of the state.<sup>3</sup> And a bill for an injunction can not be maintained to have declared null and void proceedings for the incorporation of a village under an act of legislature for the incorporation of villages, the appropriate remedy in such a case being by proceedings

<sup>1</sup> *Telford v. Metropolitan Board of Works*, L. R. 18 Eq., 574.

<sup>3</sup> *Stephens v. Minnerly*, 6 Thomp. & C., 318.

<sup>2</sup> *Clark v. Dayton*, 6 Neb., 192.

in the nature of a *quo warranto*.<sup>1</sup> And in conformity with the general doctrine that courts of equity will not revise the action of municipal bodies, or correct their errors, in matters resting within their jurisdiction and authority, an injunction will not be granted to restrain the organization of a school district which is being made by the proper municipal authorities under a power conferred upon them by law for that purpose, where the gravamen of the bill is that the officers have acted upon illegal and improper evidence upon the hearing of the application for the formation of such new district.<sup>2</sup>

§ 1262. An injunction may be granted to restrain a municipal corporation from incurring debts in excess of the maximum fixed by the constitution of the state, or by the laws governing the city, as the limit to municipal indebtedness, upon a bill by a citizen and tax payer of the municipality.<sup>3</sup> So the levy by a town of a tax in excess of the limit fixed by law, for the payment of a donation in aid of a railway, may be enjoined by a tax payer who has paid that portion of the tax which is lawfully due.<sup>4</sup> And where, under its charter, a city is restricted in creating liabilities in any one year to the amount to be raised by taxation during such year, and payments upon contracts are to be made from the taxes for the year when such contracts are made, the city may be restrained from making a contract for lighting the streets extending over a term of years in the future.<sup>5</sup> So tax payers may restrain the enforcement

<sup>1</sup> *People v. Clark*, 70 N. Y., 518.

<sup>2</sup> *Lane v. Morrill*, 51 N. H., 422.

<sup>3</sup> *City of Springfield v. Edwards*, 84 Ill., 626; *Davenport v. Kleinschmidt*, 6 Mont., 502; *Sackett v. City of New Albany*, 38 Ind., 473. See also *Hudson v. Mayor*, 64 Ga., 286. See, as to the right to enjoin a county from contracting an indebtedness in excess of the amount allowed by law in Indiana, *Miller*

*v. Board of Commissioners*, 66 Ind., 162.

<sup>4</sup> *Miles v. Ray*, 100 Ind., 166.

<sup>5</sup> *Putnam v. City of Grand Rapids*, 58 Mich., 416. But see, *contra*, *City of Valparaiso v. Gardner*, 97 Ind., 1, where it is held that a continuing contract made by a city for a supply of water for twenty years, at an annual expense of \$6,000, does not create an indebt-



of bonds issued by a county for the purchase of lands for the erection of a court house, in violation of a statute limiting the expenditures of the county for any one year to the amount raised by taxation for that year.<sup>1</sup> Where, however, an injunction was granted against a city to restrain it from increasing its indebtedness by contract beyond the legal limit for works of municipal improvement, a delay of several months after the making of the contracts in seeking relief was held to constitute sufficient ground for dissolving the injunction.<sup>2</sup>

§ 1263. Where a particular fund is to be apportioned to all the public schools in a township for their support, but it is being wrongfully appropriated for the support of one school to the exclusion of others, a citizen and tax payer of the township is entitled to an injunction to prevent such improper application of the fund.<sup>3</sup> And it would seem that an injunction is the appropriate remedy, in behalf of the taxable inhabitants of a school district, to restrain the township treasurer from paying out money for the erection of a school house at a place other than that authorized by law.<sup>4</sup> And where municipal officers are enjoined from the performance of an official act, such as the removal of a school house, upon the ground of a want of authority, if the answer fails to show a clear right to the performance of the act in question the injunction should be continued to the hearing.<sup>5</sup> And where municipal officers are proceeding to issue bonds of the municipality for the erection of a school house, without compliance with a statute requiring an election to be held to authorize such indebtedness, they may be enjoined.<sup>6</sup> But the authorities of a school district will not be enjoined from removing a school house to an

edness within the constitutional prohibition, and that an injunction will not lie in such case.

<sup>1</sup> *Crampton v. Zabriskie*, 101 U. S., 601.

<sup>2</sup> *Collings v. City of Camden*, 12 C. E. Green, 293.

<sup>3</sup> *Maloy v. Madget*, 47 Ind., 241.

<sup>4</sup> *Marble v. McKenney*, 60 Me., 332.

<sup>5</sup> *Trotter v. Paunley*, 39 Iowa, 203.

<sup>6</sup> *Bowen v. Mayor of Greenesboro*, 79 Ga., 709.

other site when the plaintiff does not show that he will sustain any special or peculiar injury, different from that to the public.<sup>1</sup>

§ 1264. A receiver appointed over certain property who is entitled to its possession, holding and renting it for the benefit of all parties interested in the litigation, may maintain an action for an injunction against the authorities of a municipal corporation who interfere with his possession and attempt to collect the rents of the property in question.<sup>2</sup>

§ 1265. Where a statute prohibits any theatrical or dramatic entertainment in a city unless duly licensed by the mayor, and provides for the granting of an injunction to restrain the opening of any such entertainment until a license shall have been obtained, the right to an injunction under the statute is not affected or impaired by a subsequent statute which makes the giving of such performance upon Sunday a misdemeanor, and punishes it accordingly.<sup>3</sup>

§ 1266. The fact that a board of municipal officers are proceeding in the exercise of certain arbitrary powers conferred upon them by law, without leaving to the person affected by their proceedings the right of appeal allowed him by law, has been held to constitute sufficient ground for enjoining their action.<sup>4</sup>

§ 1267. Where the charter of a city provides that its solicitor shall represent it in all suits in which its property or rights are involved, an injunction will not be allowed for the purpose of preventing the common council of the city from employing another attorney in its suits, the remedy by injunction not being regarded as appropriate to such a case.<sup>5</sup>

<sup>1</sup> *Parody v. School District*, 15 Neb., 514.

<sup>2</sup> *Grant v. City of Davenport*, 18 Iowa, 179.

<sup>3</sup> *Society v. Diers*, 60 Barb., 152; S. C., 10 Ab. Pr. N. S., 216.

<sup>4</sup> *Tinkler v. Board of Works*, 1 Gif., 412.

<sup>5</sup> *Hugg v. City of Camden*, 29 N. J. Eq. (2 Stew.), 6.

§ 1268. The holder of a county order is treated as a mere general creditor of the county, and as such he can not, before judgment on such order and the return of an execution *nulla bona*, enjoin the county from the exercise of its general right to manage and dispose of its property.<sup>1</sup> But the holder of a city bond may restrain the city council from issuing bonds, under an act of legislature in violation of the act under which the first bonds were issued, the former act providing that the city should thereafter issue no bonds except for the payment of its indebtedness. Such a provision in the original act becomes a part of the contract, and its violation by the city may be properly enjoined.<sup>2</sup> But a court of equity will not interfere in behalf of a county to enjoin the payment of a debt which has the sanction of moral obligation.<sup>3</sup>

§ 1269. A misappropriation or wrongful use of corporate property is a fraud upon the rights of corporators, and may be prevented by the aid of equity, where courts of law are powerless to grant the necessary relief. Thus, the use of a school house by the inhabitants of a school district for religious purposes, against the wishes of any tax payer of the district, is an improper use of the corporate property, although the district may have voted to permit such use. And in such case any tax payer of the district is entitled to an injunction, although the injury sustained by him in person be slight, since he can have no adequate remedy at law.<sup>4</sup> So the use of a school house for other than school purposes

<sup>1</sup> *Montague v. Horton*, 12 Wis., 599. And it is held in this case that the code of procedure has not enlarged the former jurisdiction of courts of equity to grant injunctions restraining the proceedings of subordinate tribunals, or the official acts of public officers, except in the case of temporary injunctions *pendente lite*, which may be granted under the code,

whether the action be legal or equitable.

<sup>2</sup> *Smith v. Appleton*, 19 Wis., 468.

<sup>3</sup> *County Commissioners v. Hunt*, 5 Ohio St., 488.

<sup>4</sup> *Scofield v. Eighth School District*, 27 Conn., 499. See also *Hurd v. Waters*, 48 Ind., 148; *Spencer v. School District*, 15 Kan., 259. But see, *contra*, *Bell v. City of Platteville*, 71 Wis., 139.

may be enjoined, even though the directors of the district and a majority of its tax payers and electors consent to such use. And in such case a single resident and tax payer of the district, whose children attend school therein, and whose books are injured and destroyed by such improper use of the school house, has a sufficient interest to maintain a bill for an injunction.<sup>1</sup> So the authorities of a school district may be enjoined at the suit of a tax payer from leasing a public school house for the purpose of keeping a private school.<sup>2</sup>

<sup>1</sup>Spencer v. School District, 15 directors from changing the text Kan., 259. books used in a public school, see

<sup>2</sup>Weir v. Day, 35 Ohio St., 143. School District No. 1. v. Shadduck, As to the right to enjoin school 25 Kan., 467.

## II. MUNICIPAL IMPROVEMENTS.

- § 1270. Discretion of municipal bodies not interfered with.  
 1271. Proceedings in excess of municipal powers enjoined.  
 1272. Interference with private property enjoined.  
 1273. The same; property owners not enjoined.  
 1274. Illustrations of the general doctrine.  
 1275. Misappropriation of land dedicated to public use.  
 1276. Opening streets over lands of state; construction of additional street railway.  
 1277. Police power; closing street by land owner.  
 1278. Construction of sewers.  
 1279. Grading public streets; actual danger necessary; effect of laches.  
 1280. Raising approach to bridge.  
 1281. Contract for paving street.  
 1281 *a*. Vested rights in streets; gas, water, telegraph and street railway companies.

§ 1270. The general principle already stated denying relief by injunction against the action of municipal bodies in matters properly resting within their jurisdiction, in the absence of fraud, applies with especial force to cases where the relief is sought against the construction by municipal corporations of works of public improvement, such as streets, bridges, public buildings, sewers and other like works pertaining to municipal government. And whenever such matters have been intrusted by law to the judgment and discretion of municipal officers or boards, equity will not revise or control the exercise of their discretion, or interfere with their action in the absence of fraud, and while they continue to act within the scope of the powers conferred upon them by law.<sup>1</sup> Thus, where the common council of a city are made by law judges of the necessity

<sup>1</sup> *Inhabitants of Greenville v. Corporation of Georgetown*, 6 Seymour, 7 C. E. Green, 458; *Sugar Wheat*, 593; *Torrent v. Common Refining Company v. Mayor*, 11 Council, 47 Mich., 115; *Morgan v. City of Binghamton*, 102 N. Y., 10 C. E. Green, 345; *Mayor v. Eldridge*, 64 Ga., 524; *Bacon v. 500. See also Montgomery v. Orr*, 27 Fed. Rep., 675.  
*Walker*, 77 Ga., 336; *Goszler v.*

for a work of public improvement, such as a street, and have contracted therefor, the work and the contract being within the scope of their powers, in the absence of any evidence of fraud equity will not interfere by injunction in behalf of property owners to restrain the execution of the contract.<sup>1</sup> And where the authorities of a city are fully empowered to alter and change the grade of streets, equity will not enjoin them from proceeding to make such change, if they are acting within the scope of their authority.<sup>2</sup> Nor will municipal officers be enjoined from changing the grade of a street at the suit of one who shows no substantial injury as likely to result from their action.<sup>3</sup> Nor will they be restrained from lawful proceedings for the vacation of a street.<sup>4</sup> So they will not be restrained from opening a highway through plaintiff's premises upon the ground of irregularities in their proceedings, when the injury sustained may be readily fixed and compensated in damages.<sup>5</sup> Nor will a tax payer be permitted to enjoin the authorities of a city from erecting public buildings, when no probable injury is shown as likely to result from such erection.<sup>6</sup> And municipal officers will not be enjoined from opening a public street after the repeal of the act under which the proceedings were had, an injunction being unnecessary in such case.<sup>7</sup> And the vacation of a street will not be enjoined upon the application of a lot owner not immediately affected, his lots being located in another block, where the street is left of full width, access to his lots being undisturbed.<sup>8</sup> So when the authorities of a city are made the judges of the necessity for extending a street, or for the construction of

<sup>1</sup> *Morris v. Mayor*, 10 C. E. Green, 345.

<sup>2</sup> *Goszler v. Corporation of Georgetown*, 6 Wheat., 593.

<sup>3</sup> *City of Kokomo v. Mahan*, 100 Ind., 242.

<sup>4</sup> *Meredith v. Sayre*, 32 N. J. Eq., 557.

<sup>5</sup> *Smith v. Weldon*, 73 Ind., 454.

<sup>6</sup> *City of Richmond v. Davis*, 103 Ind., 449.

<sup>7</sup> *Cohen v. Gray*, 70 Cal., 85.

<sup>8</sup> *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan., 625. See also *City of Chicago v. Union Building Association*, 102 Ill., 379; *McGee's Appeal*, 114 Pa. St., 470.

a bridge as a continuation of a street, equity will not review their judgment or conclusions upon a bill to enjoin such proposed action, in the absence of any allegations of fraud.<sup>1</sup> Nor will a court of equity interfere by injunction with the action of a board of commissioners empowered to establish and repair streets and to make municipal improvements, when they are acting within the scope of their legal authority, however impolitic or oppressive may be the law under which they are acting, since the remedy for such grievances must be sought at the hands of the legislature and not of the courts.<sup>2</sup> And the removal by municipal officers of obstructions from streets being a necessary exercise of the ordinary police powers of municipal government, it can not be enjoined as a trespass.<sup>3</sup>

§ 1271. Still having in view the question of power or jurisdiction on the part of the municipal body as the controlling question in determining whether preventive relief shall be allowed against their action, the rule is well established that when a municipal corporation is proceeding in excess of its powers, or in the total absence of all power or jurisdiction in the premises, to construct works of public improvement, which are likely to result in irreparable injury to property owners, an injunction is the appropriate means of relief.<sup>4</sup> And where a board of municipal officers, such as the trustees of a town, are authorized by law to make street improvements upon petition by a majority of the lot owners resident upon the street, such petition being necessary to the jurisdiction of the board, a court of equity may enjoin contractors from proceeding with such improve-

<sup>1</sup> *Sugar Refining Company v. Mayor*, 11 C. E. Green, 247.

<sup>2</sup> *Inhabitants of Greenville v. Seymour*, 7 C. E. Green, 458.

<sup>3</sup> *Sheen v. Stothart*, 29 La. An. 630.

<sup>4</sup> *Armstrong v. City of St. Louis*, 3 Mo. App., 151; *Town of Covington v. Nelson*, 35 Ind., 532; *Conrad*

*v. Smith*, 32 Mich., 429; *Carter v. City of Chicago*, 57 Ill., 283; *Dinwiddie v. President of Rushville*, 37 Ind., 66; *State v. Commissioners of Marion Co.*, 21 Kan., 419; *Same v. Same*, *Ib.*, 437. See also *Middleton v. Greeson*, 106 Ind., 18; *Robertson v. Breedlove*, 61 Tex., 316.

ments under an ordinance passed without the necessary petition.<sup>1</sup> And it is proper, in such case, for one resident and tax payer of the town to institute the action in behalf of himself and all others interested in the subject-matter of the suit and the relief sought.<sup>2</sup> And where the power of a city to make street improvements, such as paving, is dependent upon a petition of a majority of the frontage to be affected and the publication of a notice, and property owners are entitled to be heard as to whether there has been a compliance with such conditions and such hearing has been denied them, they may enjoin the execution of an ordinance for the improvement until a hearing is afforded them.<sup>3</sup> So when a city has no authority to change the grade of a street once established, when improvements have been made with reference to such grade, without payment of the damages caused by the change, an abutting property owner may enjoin the city from making the change when his damages have not been assessed or paid.<sup>4</sup> And a city has been enjoined from changing the name of a street, upon a bill by householders and persons doing business on such street showing that serious injury would result to them from the change, the city having no statutory authority for its action.<sup>5</sup> And a tax payer may enjoin a city from issuing bonds in payment of an assessment for a public improvement, when such assessment is void.<sup>6</sup> So where city authorities are about to change the grade of and to open a street, in violation of the powers conferred by their charter and without authority of law, they may be enjoined from proceeding at the suit of an adjacent property owner.<sup>7</sup> So, too, when public improvements are being made under a

<sup>1</sup> *Town of Covington v. Nelson*, 35 Ind., 532. See also *Makemson v. Kauffman*, 35 Ohio St., 444.

<sup>2</sup> *Town of Covington v. Nelson*, 35 Ind., 532.

<sup>3</sup> *Dennison v. City of Kansas*, 95 Mo., 416.

<sup>4</sup> *Phillips v. City of Council Bluffs*, 63 Iowa, 576.

<sup>5</sup> *Anderson v. Lord Mayor*, 15 L. R. Ir., 410.

<sup>6</sup> *Schumacker v. Toberman*, 56 Cal., 508.

<sup>7</sup> *Armstrong v. City of St. Louis*, 3 Mo. App., 151.



town ordinance which is illegal and void, an injunction is the proper remedy in behalf of property owners, inasmuch as the title to their property may be clouded by an apparent lien for the expense of such improvements.<sup>1</sup> And where a board of highway commissioners of a town, acting in excess of their powers and without legal authority, are about to construct a ditch in front of complainant's premises which is likely to result in irreparable injury, they may be restrained from proceeding. Nor is complainant estopped from relief in such case by the fact that he had bid for and received the work at a public bidding, when his bid was made for the purpose of controlling the work and holding it in abeyance until he could apply for an injunction.<sup>2</sup> And a municipal corporation may be restrained from opening a new street and from collecting an assessment therefor from adjacent lot owners, when the proceedings of the corporation appear to be regular upon their face, but are in fact invalid, and when extrinsic evidence is necessary to establish their invalidity.<sup>3</sup> It is to be understood, however, that equitable relief in these cases is granted only in the absence of an adequate remedy at law. And a court of equity will not restrain municipal officers from tearing up a sidewalk in front of complainant's premises and replacing it with a new one because of a want of authority, when relief may be had at law by resisting the enforcement of any tax or assessment that may be levied in payment for such work.<sup>4</sup>

<sup>1</sup> *Dinwiddie v. President of Rushville*, 37 Ind., 66.

<sup>2</sup> *Conrad v. Smith*, 32 Mich., 429.

<sup>3</sup> *Miller v. Mayor of Mobile*, 47 Ala., 163. And it is said in this case that the exceptions to the doctrine of non-interference with the proceedings of municipal or public officers in the discharge of their duties are comprised in three classes; first, where the proceedings of the subordinate or municipi-

pal tribunal will necessarily lead to a multiplicity of suits; second, where they lead in their execution to the commission of irreparable injury to the freehold; third, where an adverse claim is asserted to the realty which is valid upon its face, and extrinsic facts must be shown to establish its invalidity or illegality.

<sup>4</sup> *Brush v. City of Carbondale*, 78 Ill., 74.

§ 1272. Relief by injunction may also be granted to prevent municipal officers from attempting to take possession of private property upon the pretense that it has been dedicated as a public street or highway by the owner, when, in fact, there has been no such dedication, or if it ever occurred the easement has been lost through non-user and abandonment by the city, and by a continuous and adverse possession on the part of the owner of the fee for more than twenty years.<sup>1</sup> And when municipal officers threaten the removal of complainants' buildings upon the ground that they encroach upon a public street, but complainants have been in uninterrupted possession for more than twenty years under claim of legal title, it is proper to restrain the municipal authorities from interfering with the buildings until the question of title may be determined at law.<sup>2</sup> So the owner of town property, who has never dedicated it to the use of the public as a street, may restrain the town from opening streets through such land without having taken the necessary legal steps for its condemnation.<sup>3</sup> And such property owner may restrain the town authorities from constructing pavements upon his land which he has not dedicated to the public use, and when the land has not been condemned for such purpose.<sup>4</sup> But a property owner seeking to restrain a city from appropriating his property for a public street must not only show that it has never been granted for that purpose, but that there has been no implied dedication.<sup>5</sup> And a municipal corporation will not

<sup>1</sup> *City of Peoria v. Johnston*, 56 Ill., 45. See also *Wetherell v. Town of Newington*, 54 Conn., 67.

<sup>2</sup> *Manchester Cotton Mills v. Town of Manchester*, 25 Grat., 825.

<sup>3</sup> *Pierpoint v. Town of Harrisville*, 9 West Va., 215. See also *Uren v. Walsh*, 57 Wis., 98.

<sup>4</sup> *Boughner v. Town of Clarksburg*, 15 West Va., 394. See as to the effect of the repeal of a city

ordinance for the improvement of a street upon an injunction previously granted against such improvement, *Kaime v. Harty*, 4 Mo. App., 357.

<sup>5</sup> *Faust v. City of Huntington*, 91 Ind., 493. But it is held in Iowa that a property owner may enjoin a road supervisor from removing a fence along the line of a highway adjoining plaintiff's premises, until

be enjoined from opening a public street through plaintiff's premises, upon the ground that it has not acquired the right so to do, when it is doubtful upon the facts shown whether the city has not already acquired such right.<sup>1</sup>

§ 1273. A municipal corporation which is about to make a permanent appropriation of private property to the use of the public, without having taken the requisite steps to determine the necessity for such appropriation, may be enjoined from so doing.<sup>2</sup> And the officers of a school district may be restrained from entering upon and taking possession of plaintiff's property for the erection of a school house, without his assent and without ascertaining and paying his damages in the manner provided by law.<sup>3</sup> So, too, municipal officers may be enjoined from converting private property to the uses of a public street without having made compensation therefor to the owner of the fee.<sup>4</sup> But a court of equity will not, at the suit of a municipal corporation, enjoin individual owners of property, to be affected by the proposed opening of a street, from making improvements and building thereon, when the corporation has only taken the initiatory steps toward opening the street, and the provisions of the statute have not yet been complied with. In such case the corporation showing no vested right, either legal or equitable, which is likely to be injured by the proposed action, it is not entitled to the aid of equity.<sup>5</sup>

§ 1274. Where a municipal corporation has complied with all the statutory requirements for the opening of a street, its proceedings will not be enjoined upon mere gen-

the right to make such removal C. E. Green, 216; *Mason City S. & may be determined. Bolton v. M. Co. v. Mason*, 23 West Va., 211; *McShane*, 67 Iowa, 207. Winslow v. Nayson, 113 Mass., 411.

<sup>1</sup> *Bass v. City of Shakopee*, 27 Minn., 250. See also *Ruhland v. Jones*, 55 Wis., 673. But see, *contra*, *Mayor v. Gardner*, 33 N. J. Eq., 622, reversing

<sup>2</sup> *Lumsden v. Milwaukee*, 8 Wis., 485. *S. C. sub nom. Gardner v. Mayor of Jersey City*, 32 N. J. Eq., 586.

<sup>3</sup> *Church v. Joint School District No. 12*, 55 Wis., 399. <sup>5</sup> *New York v. Mapes*, 6 Johns. Ch., 46.

<sup>4</sup> *Folley v. City of Passaic*, 11

eral averments in the bill of complainant's belief of collusive and partial conduct on the part of the corporate authorities.<sup>1</sup> And where by the charter of a city its corporate authorities are vested with exclusive control over the streets, and they grant permission to a railway company to locate its track along the line of a certain street, the owners of property fronting thereon will not be permitted to enjoin the laying of the track.<sup>2</sup> But after a street has been regularly laid out and opened of a specified width, the common council can not authorize owners of adjoining lots to reduce the width, and may be restrained from attempting so to do.<sup>3</sup> So, too, the corporate authorities of a town may be enjoined from encroaching upon the property of private citizens, although such encroachment is made under pretense of preventing obstructions to streets and alleys.<sup>4</sup>

§ 1275. The rule may be broadly stated, that courts of equity have undoubted jurisdiction to interfere by injunction when the corporate authorities of a city are taking improper or illegal proceedings, under claim of right, to do an act injurious to the rights of citizens and property holders. Thus, where land has been dedicated to a particular purpose, as a public street or square, and the common council of a city have appropriated it to another and an entirely different purpose, sufficient ground exists for an injunction, at the suit of the owners of lots adjacent to the street or square which it is sought to appropriate to a use other than that for which it was originally designed.<sup>5</sup>

§ 1276. The power which is conferred by a state upon a municipal corporation to lay out streets is not an absolute power to be asserted as against the state itself, but is subordinate to the sovereign power of the state over its own lands. Such corporation may, therefore, be restrained from

<sup>1</sup> *Champlin v. Mayor*, 3 Paige, 573.

<sup>2</sup> *Moses v. Pittsburgh, Ft. Wayne & C. R. Co.*, 21 Ill., 516.

<sup>3</sup> *Lawrence v. Mayor*, 2 Barb., 577.

<sup>4</sup> *Dudley v. Trustees*, 12 B. Mon., 610.

<sup>5</sup> *Cooper v. Alden, Harring.* (Mich.), 72; *Marshall v. Commissioners*, 89 N. C., 103.

laying out its streets over lands of the state without its consent being first obtained, since in delegating to a municipality the power to lay out streets, the state can not be presumed to have granted authority to do so against its own sovereign rights over its own property, without its consent.<sup>1</sup> So, notwithstanding the grant or dedication by the state to a municipal corporation of the streets and public squares of a city, such grant must be construed to have been made subject to the right of eminent domain. And there is still reserved in the legislative power of the state the right to modify the grant in future by imposing an additional servitude upon the streets, as by granting to a corporation the power to operate a street railway over them. A court of equity will not, therefore, grant an injunction in behalf of the municipality to restrain the construction of a street railway in a city, when it has been duly authorized by act of legislature.<sup>2</sup>

§ 1277. Courts of equity are averse to interfering with the exercise of the police powers conferred by law upon municipal authorities, such as the power to keep open the public streets of a city, and will not ordinarily grant an injunction for this purpose. And where a city has occupied and used a strip of ground for many years as a public street, the original proprietor of the land will not be allowed to enjoin the city authorities from going upon the land, or keeping it open for public use, or preventing complainant from fencing it.<sup>3</sup> But a municipal corporation which, in the exercise of the right of eminent domain, has taken private land for public purposes, as in the opening of a public street, is entitled to an injunction to prevent the closing up of the street by the land owner, upon tendering him the amount of his damages as awarded in the condemnation proceeding.<sup>4</sup>

<sup>1</sup> *Mayor of Atlanta v. The Central R. Co.*, 53 Ga., 120.

<sup>2</sup> *Savannah & Thunderbolt R. Co. v. The Mayor*, 45 Ga., 602.

<sup>3</sup> *City of Chicago v. Wright*, 69 Ill., 318.

<sup>4</sup> *Jersey City v. Fitzpatrick*, 3 Stew., 97.

§ 1278. A municipal corporation may be restrained at the suit of private land owners from laying a sewer through property claimed by complainants as their own private property, when the authority of the corporation is limited to laying sewers in the public streets.<sup>1</sup> But a property owner in a city can not enjoin the construction of a sewer because of omissions and irregularities in the proceedings of the city authorities in opening the streets, the proper remedy being at law by the writ of *certiorari*. Nor in such case will the relief be granted because the contract entered into by the city with the builders of the sewer is defective in form or in the parties thereto.<sup>2</sup> And when complainants have knowingly permitted a city to take possession of their land and to expend a large amount of public funds in preparing it for use as a public highway, and have encouraged such expenditure of money by their inaction, they will not be allowed to enjoin the city from the construction of a sewer over the land in question.<sup>3</sup>

§ 1279. A court of equity will not enjoin municipal officers from grading and improving certain land lying within a town as public streets, upon the application of one claiming to be the owner of such land, but who fails to show any title to the premises, a mere naked possession being insufficient to warrant the relief in such case.<sup>4</sup> And to warrant the relief in this class of cases it must clearly appear that the municipal authorities are proceeding illegally, under claim of right, to open the road or highway over plaintiff's premises; and the fact that a municipal officer has directed plaintiff to remove all obstructions upon the proposed route will not of itself warrant an injunction.<sup>5</sup> So a tax payer seeking to enjoin the completion of a public improvement

<sup>1</sup> Clark v. City of Providence, 10 R. I., 437.

<sup>2</sup> Kelsey v. King, 32 Barb., 410, affirmed on appeal, 33 How. Pr., 39. See Wiseman v. Lucksinger, 84 N. Y., 31.

<sup>3</sup> Traphagen v. Mayor, 29 N. J. Eq. (2 Stew.), 206.

<sup>4</sup> Gleason v. Jefferson, 78 Ill., 399.

<sup>5</sup> Weiss v. Jackson County, 9 Oregon, 470.

must use due diligence in asserting his right. And when he has permitted the work to proceed and the contractor to incur liabilities in good faith in its construction, he will be denied relief by injunction.<sup>1</sup>

§ 1280. In conformity with the general doctrine denying equitable interference with matters resting in the discretion of municipal officers, it is held that where the common council of a city are invested with the power of building bridges in the city, which includes of necessity the power of making such approaches thereto as are necessary for their convenient use, the whole matter resting in their sound discretion, they will not be enjoined at the suit of an adjacent lot owner, owning the fee to the center of the street, from raising the grade of the street for the purpose of making a suitable approach to the bridge.<sup>2</sup>

§ 1281. Where the proper authorities of a city have entered into a contract for the paving of a public street, the contract itself being proper and within the power of the city, equity will not, at the suit of a property owner upon the street in question, enjoin the contractor from proceeding in violation and disregard of his contract.<sup>3</sup>

§ 1281 *a*. A city may be enjoined from interfering with vested rights in its streets, such as the right to lay gas or water pipes for supplying the city and its inhabitants. And when such privileges have been lawfully granted, either by a city itself which is duly authorized to make such grant, or when the right is conferred by charter upon a corporation, the acceptance of the grant and the construction of the works entitle the grantee to protection by injunction against interference or obstruction by the municipal authorities.<sup>4</sup> And in such case the city officials may be enjoined from arresting and prosecuting plaintiff's employes

<sup>1</sup> *Brown v. Merrick Co.*, 18 Neb., 355.

<sup>2</sup> *Gray v. City of Brooklyn*, 7 Hun, 632.

<sup>3</sup> *McCafferty v. McCabe*, 4 Ab. Pr., 57; S. C., 13 How. Pr., 275.

<sup>4</sup> *City of Quincy v. Bull*, 106 Ill., 337; *City of Atlanta v. Gate City G. L. Co.*, 71 Ga., 106.

while engaged in their work.<sup>1</sup> But when a telegraph company has constructed its lines within a city under an ordinance requiring them to be taken down within a fixed time, and the city officials have forcibly cut and removed the wires, they will not be enjoined from interfering with the company in replacing its wires, when its rights under the ordinance have expired.<sup>2</sup> And a city, which has granted to a street railway company the right to construct and operate its tracks in the streets, can not enjoin the company from using a particular kind of rail on the ground that it would constitute a nuisance, the city having full power to regulate the manner of constructing the track.<sup>3</sup>

<sup>1</sup> *City of Atlanta v. Gate City G. L. Co.*, 71 Ga., 106.

<sup>3</sup> *Waterloo v. Waterloo S. R. Co.*, 71 Iowa, 193.

<sup>2</sup> *Mutual Union T. Co. v. City of Chicago*, 11 Biss., 539.



## III. MUNICIPAL-AID SUBSCRIPTIONS,

- § 1282. The general doctrine stated; unconstitutional donation enjoined.
1283. Illegal and unauthorized donation enjoined.
1284. Statutory conditions must be complied with; preliminary vote.
1285. Court must determine question of election.
1286. Holding of election not enjoined.
1287. Aliens allowed relief.
1288. When injunction refused.
1289. When issue or delivery of railway-aid bonds enjoined.
1290. The same.
1291. Change in nature of railway enterprise ground for injunction.
1292. Subscriptions contingent upon others.
1293. Distinction between municipal donation and subscription to stock of railway.
1294. Injunction against state treasurer.
1295. Bonds actually issued.
1296. Proceeds of tax in hands of official custodian.
1297. Parties.

§ 1282. A branch of the law of injunctions of modern origin, and one which seems to have been unknown to the English Court of Chancery, is that which pertains to the jurisdiction as exercised in restraint of an improper donation of public funds by municipal corporations, in aid of the construction of railroads and other public or *quasi* public enterprises of a like nature. These donations usually take the form of a subscription to the capital stock of the railroad or other undertaking, or of an absolute donation of public funds or bonds of the municipality in furtherance of the enterprise to which its aid is pledged. But in whatever manner a municipal corporation seeks to divert its funds or its credit from strictly municipal purposes, a careful scrutiny is exercised by the courts over such donations, and municipalities are held to a strict adherence to the power under which the donation or subscription is authorized, and a departure therefrom affords frequent occasion for resort to the extraordinary aid of equity by injunction.<sup>1</sup>

<sup>1</sup>For a discussion of the principles by which the courts are governed in granting injunctions against taxes levied in furtherance

And it may be affirmed as a general and well established rule of universal application, that unless such municipal subscriptions are authorized and sanctioned by a valid and constitutional expression of the legislative will and the legislative power, property owners and tax payers are entitled to the aid of an injunction to restrain the municipality from such unauthorized diversion of its money or its credit.<sup>1</sup> Indeed, the right of a citizen and tax payer to maintain an action to enjoin the corporate authorities of a town from issuing its bonds without authority of law may now be regarded as too well established to admit of question.<sup>2</sup> And an injunction will be granted at the suit of citizens and tax payers, to prevent the issuing of municipal bonds in aid of a subscription to a railway which is made in disregard of the constitution of the state.<sup>3</sup> So municipal authorities will be enjoined from issuing bonds in payment of a subscription to the capital stock of a railway, and from levying and collecting taxes for the payment of such bonds, when a constitutional provision requiring such subscription to be submitted to a vote of the people has been entirely disregarded.<sup>4</sup> And the taxable inhabitants of a town may enjoin the town authorities from issuing or negotiating its bonds in aid of a private enterprise, to which the town has

of municipal-aid subscriptions, see Chapter VIII, Subdivision V, Municipal-Aid Taxes.

<sup>1</sup> *Allen v. Inhabitants of Jay*, 60 Me., 124; *List v. City of Wheeling*, 7 West Va., 501; *State v. Saline Co. Court*, 51 Mo., 350; *Foster v. Kenosha*, 12 Wis., 616; *Flack v. Hughes*, 67 Ill., 384; *Chestnutwood v. Hood*, 68 Ill., 132; *Supervisors of Livingston Co. v. Weider*, 64 Ill., 427; *Marshall v. Silliman*, 61 Ill., 218; *Campbell v. Paris & D. R. Co.*, 71 Ill., 611; *Supervisors of Jackson Co. v. Brush*, 77 Ill., 59; *Allison v. Louisville, H. C. & W. R. Co.*, 9 Bush, 247; *Commission-*

*ers of Delaware Co. v. McClintock*, 51 Ind., 325; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230; *Curtenius v. Hoyt*, 37 Mich., 583; *McPike v. Pen*, 51 Mo. 63; *Counterman v. Dublin Township*, 38 Ohio St., 515; *Metzger v. Attica & A. R. Co.*, 79 N. Y., 171; *Harrington v. Town of Plainview*, 27 Minn., 224.

<sup>2</sup> *Chestnutwood v. Hood*, 68 Ill., 132.

<sup>3</sup> *List v. City of Wheeling*, 7 West Va., 501.

<sup>4</sup> *State v. Saline Co. Court*, 51 Mo., 350.

loaned its credit under a statute which is held to be unconstitutional.<sup>1</sup>

§ 1283. The illustrations of the general doctrine which have been mentioned in the preceding section are cases where the municipal subscription or donation was made in disregard of some constitutional restriction embodied in the organic law of the state. But, although the attempted donation of the municipal funds or municipal credit may contravene no provision of the constitution, yet if it has not the sanction of legislative authority it will be treated as void, and may be enjoined in behalf of a tax payer seeking the relief.<sup>2</sup> Thus, where a board of county commissioners have voted an issue of county bonds in aid of the construction of a railway, without authority of law, there being no legislation authorizing such appropriation, the issuing of the bonds will be enjoined.<sup>3</sup> So the issuing of township bonds in aid of a railway corporation will be enjoined when the town authorities have no power or legal authority to make such subscription, or to issue the bonds. And in such a case it is sufficient to aver in the bill upon information and belief that the railway company will soon demand of the town supervisor the bonds in question, and that there is danger that the bonds will be issued unless the injunction is granted.<sup>4</sup> So an individual citizen and tax payer, resident within the township and having property therein subject to taxation, may maintain a bill to enjoin the township officers from issuing railway-aid bonds of the town which are illegal and invalid.<sup>5</sup> Nor is the relief confined to tax payers and citizens, but it may also be extended in aid of the municipality itself. And where public officers have in their hands funds of a county which they are about to pay

<sup>1</sup> *Allen v. Inhabitants of Jay*, 60 Me., 124.

<sup>2</sup> *Commissioners of Delaware Co. v. McClintock*, 51 Ind., 325; *Campbell v. Paris & D. R. Co.*, 71 Ill., 611; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230;

*Lynch v. Eastern, La F. & M. R. Co.*, 57 Wis., 430.

<sup>3</sup> *Commissioners of Delaware Co. v. McClintock*, 51 Ind., 325.

<sup>4</sup> *Campbell v. Paris & D. R. Co.*, 71 Ill., 611.

<sup>5</sup> *Curtenius v. Hoyt*, 37 Mich., 583.

over to a railway company in payment of interest upon bonds of the county issued in aid of the railway without authority of law, and which are void in the hands of the holders, equity may enjoin such payment in an action brought by the board of county commissioners for that purpose.<sup>1</sup>

§ 1284. It is also to be observed that, although there may be a valid and constitutional expression of the legislative will, authorizing a municipality to lend its credit or to donate its funds or obligations in aid of other than municipal enterprises, the courts require a strict adherence to the terms and conditions under which the power is conferred. And when, as is usually the case, the statute conferring the power requires the question of its exercise to be first submitted to a vote of the electors, who are to determine whether the municipality shall lend its aid or issue its obligations in aid of a railway or other enterprise of like nature, a failure to comply with the conditions thus imposed, either by entirely omitting such election, or by a substantial departure from the statute as regards the time and notice of the election, will warrant relief by injunction.<sup>2</sup> A court of equity will therefore entertain jurisdiction in behalf of a tax payer of a municipality, to restrain it from issuing its bonds in aid of a subscription to a railway company with-

<sup>1</sup> *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230. As to the existence of a defense to municipal-aid bonds, coupled with the risk of losing evidence, and apprehensions of a multiplicity of suits as grounds for enjoining actions upon such bonds, see *Town of Springport v. Teutonia Savings Bank*, 75 N. Y., 397.

<sup>2</sup> *Bronenberg v. Commissioners of Madison Co.*, 41 Ind., 502; *Finney v. Lamb*, 54 Ind., 1; *McPike v. Pen*, 51 Mo., 63; *Wright v. Bishop*, 88 Ill., 302; *Hodgman v. Chicago*

& St. P. R. Co., 20 Minn., 48; *Goedgen v. Supervisors*, 2 Bissell, 328; *Union Pacific R. Co. v. Lincoln Co.*, 3 Dill., 300. See also *Jones v. Hurlburt*, 13 Neb., 125. And where a petition of tax payers is necessary to authorize the issuing of the bonds, the signing of the petition on Sunday, in violation of a statute prohibiting the doing of business on Sunday, has been held to be sufficient ground for enjoining the delivery of the bonds. *De Forth v. Wisconsin & M. R. Co.*, 52 Wis., 320.

out the necessary vote of the electors authorizing such issue.<sup>1</sup> So when the statute authorizing subscriptions by a city in aid of a railroad provides that the subscription shall not take effect until an ordinance specifying the time, terms and conditions of the bonds to be issued shall be first submitted for approval to a vote of the people, the authority to issue the bonds being dependent upon the vote, a failure to comply with the statute in that regard affords ground for an injunction at the suit of an individual property owner and tax payer.<sup>2</sup> And a board of county supervisors will be enjoined from issuing bonds of the county in aid of a subscription to a railway, when they have failed to comply with the conditions of the statute as to giving notice and holding an election upon the question of such subscription.<sup>3</sup> So where a statute authorizing the issue of municipal bonds for the construction of public buildings requires the debt thus created to be paid in ten years, but the vote as submitted to the people and adopted is for payment of the bonds in twenty years, such a substantial departure from the requirements of the law will justify relief by injunction against issuing the bonds.<sup>4</sup> So also when a board of county commissioners are authorized by law to issue bonds for such purposes as the erection of public buildings, the interest on such bonds to be paid annually, if they are proceeding to issue the bonds with interest payable semi-annually their action will be regarded as illegal and void, and may be enjoined at the suit of a citizen and tax payer.<sup>5</sup> And when the relief is sought upon the ground that the election submitting the question to the popular vote was illegal, it is proper to entertain the application before the issuing of the bonds as well as afterward.<sup>6</sup>

<sup>1</sup> *Wright v. Bishop*, 88 Ill., 302;  
*Kentucky U. R. Co. v. Bourbon*  
County, 85 Ky., 98.

<sup>2</sup> *Hodgman v. Chicago & St. P.*  
*R. Co.*, 20 Minn., 48.

<sup>3</sup> *Goedgen v. Supervisors*, 2 Bis-  
sell, 328.

<sup>4</sup> *Union Pacific R. Co. v. Lincoln*  
*Co.*, 3 Dill., 300.

<sup>5</sup> *English v. Smock*, 34 Ind., 115.

<sup>6</sup> *Winston v. Tennessee & P. R.*  
*Co.*, 1 Baxter, 60.

§ 1285. Since courts of equity thus interfere by injunction to prevent the issuing of municipal-aid obligations because of non-compliance with the law requiring an election, it follows of necessity that they must extend the jurisdiction to the point of investigating and determining the validity of the election under which the proposed action is had. It is accordingly held, upon a bill by tax payers to restrain the issuing of county bonds in aid of a subscription to a railway, upon the ground of the illegality of the election under which the bonds are issued, that the court has jurisdiction to investigate and pass upon the validity of such election. In such cases the jurisdiction is exercised, not with a view to contesting the election, but for the purpose of ascertaining whether the contract of subscription has been duly authorized in accordance with law.<sup>1</sup> And the fact that the county commissioners have declared the result of the election to be in favor of the subscription does not oust the jurisdiction of equity, or prevent the court from inquiring into the legality of the election.<sup>2</sup> But the courts will not permit technical objections or mere irregularities to defeat the plainly expressed will of the people in this class of cases. And if there has been a substantial compliance with the statute concerning the manner of holding the election and if the will of the voters as shown by such election is clearly in favor of the donation, the court will not enjoin the issuing of the bonds upon merely technical or formal grounds, which do not challenge the correctness of the result.<sup>3</sup> Where, however, the statute authorizing the subscription upon the consent of a certain proportion of

<sup>1</sup> *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60; *McDowell v. Massachusetts & S. C. Co.*, 96 N. C., 514; *Goforth v. Rutherford R. C. Co.*, 96 N. C., 535.

<sup>2</sup> *McDowell v. Massachusetts & S. C. Co.*, 96 N. C., 514; *Goforth v. Rutherford R. C. Co.*, 96 N. C., 535. As to the right to restrain county

commissioners from canvassing the returns of an election held to authorize a subscription to the capital stock of a railway company in Kansas, see *State v. Commissioners of Wabaunsee Co.*, 36 Kan., 180.

<sup>3</sup> *Trimmier v. Bomar*, 20 S. C., 354.

tax payers makes the written consent of the tax payers, verified by affidavit of the town assessors, evidence of the required conditions, a court of equity will not, upon an application for an injunction against the issuing of the bonds, go behind such evidence or examine into the question of whether the requisite consent was actually obtained.<sup>1</sup>

§ 1286. It is to be borne in mind, however, that the jurisdiction as exercised upon the grounds under discussion does not extend to enjoining the election to determine the question of lending municipal aid, when such election is duly held in accordance with the statute. And where a board of municipal officers are authorized by law to call an election upon the question of voting a subscription in aid of a railway, and the election is called in accordance with the requirements of the statute, a court of equity has no power to enjoin the holding of such election. And the court having no jurisdiction in such case, its writ of injunction, if granted, will be held absolutely void, and defendants are not guilty of a contempt in refusing to regard or obey it.<sup>2</sup>

§ 1287. The preventive relief which is afforded by courts of equity through the process of injunction against the unauthorized issuing of municipal-aid bonds is not limited to cases where the jurisdiction is invoked for the protection of resident citizens and tax payers, but is granted as well in behalf of aliens having property subject to municipal taxation in payment of such bonds. And in the case of aliens seeking the relief, the jurisdiction may be exercised by the United States Circuit Court for the given district, when the amount of taxes that would be required of complainants on account of such illegal and unauthorized bonds exceeds the sum of five hundred dollars.<sup>3</sup>

§ 1288. Where railroad-aid bonds are subscribed and issued by a municipality under a statute which is not in

<sup>1</sup> *Pierce v. Wright*, 6 Lans., 306.      <sup>3</sup> *Goedgen v. Supervisors*, 2 Bis-

<sup>2</sup> *Walton v. Develing*, 61 Ill., 201; *sell*, 328.

*Darst v. The People*, 62 Ill., 306.

conflict with the constitution, and the conditions of the act have been complied with and the bonds have been issued and have passed into the hands of *bona fide* holders for value, equity will not enjoin the municipal authorities from raising the necessary funds by taxation for the payment of interest upon such bonds.<sup>1</sup> And when the law authorizing the submission of the question to a popular vote has been complied with in all essential particulars, and the bonds have been voted, a court of equity will not enjoin their issue because certain conditions have been imposed upon the railway company which is to receive the aid, when such conditions are reasonable in themselves and for the manifest interest of the county voting the bonds.<sup>2</sup> Nor will town officers be restrained from issuing bonds of the town in aid of a subscription to a railway company, when it is not positively averred that the defendants are such officers.<sup>3</sup> And a tax payer who has himself participated in issuing municipal-aid bonds is estopped from enjoining the collection of a tax for their payment.<sup>4</sup>

§ 1289. An injunction is the appropriate remedy to prevent the execution and delivery by municipal officers of negotiable bonds of the municipality, when it is shown that such officers are about to execute and put the bonds in circulation in disregard of the authority conferred upon them by law, or in violation of the trust reposed in them as municipal officers.<sup>5</sup> In such cases the relief is proper, not only to give effect to the safeguards and restraints imposed by the constitution of the state or by legislative enactments, but also to enforce the terms and conditions prescribed by the voters of the municipality. Thus, where town officers are empowered to issue railway-aid bonds upon such terms and conditions as may be agreed upon between the town

<sup>1</sup> *Cumines v. Supervisors*, 63 Barb., 287.

<sup>2</sup> *Union Pacific R. Co. v. Merrick Co.*, 3 Dill., 359.

<sup>3</sup> *Pierce v. Wright*, 6 Lans., 306.

<sup>4</sup> *Young v. Campbell*, 75 N. Y., 525.

<sup>5</sup> *Lawson v. Schnellen*, 33 Wis., 288; *City of Madison v. Smith*, 83

Ind., 502.



and the railway company, and one of the conditions thus imposed is that the bonds shall be delivered upon the construction of the railway track between certain points, but the company, instead of building its own line, adopts and leases the line of another company for a part of the distance, such non-compliance with the required conditions affords ground for enjoining the delivery of the bonds.<sup>1</sup> And when a railway company fails to comply with the conditions upon which municipal bonds have been voted, the right to the bonds being dependent upon such conditions, the delivery of the bonds may be prevented by injunction.<sup>2</sup> So when bonds of a county are voted in aid of a subscription to the capital stock of a railway company, and it is the duty of the county officers to determine as to the performance by the company of the conditions precedent to the delivery of the bonds, but without legal authority such officers place the bonds in the hands of trustees, with directions to deliver them to the railway company when satisfied of the performance of such conditions, the trustees may be restrained from making any disposition of the bonds other than to surrender them back to the proper county authorities.<sup>3</sup>

§ 1290. It is also held that where town officers are about to deliver to a railway company the bonds of the town, issued in aid of the railway, and are proceeding in violation of the conditions of subscription, they may be perpetually enjoined on the ground that if the bonds should be negotiated the town might be embarrassed in defending against them at law.<sup>4</sup> And when a petition by a majority of the freeholders of a city is necessary to authorize the city council to make the subscription, if the council act upon and deny the petition, but two years later rescind such action and vote the subscription, the negotiation of the bonds

<sup>1</sup> *Lawson v. Schnellen*, 33 Wis., 288.

<sup>2</sup> *Wagner v. Meety*, 69 Mo., 150.

<sup>3</sup> *Supervisors of Jackson Co. v. Brush*, 77 Ill., 59.

<sup>4</sup> *Danville v. Montpelier R. Co.*, 48 Vt., 144.

by the city may be enjoined.<sup>1</sup> But a tax payer of a town which has issued bonds in aid of a railway can not enjoin the transfer or delivery of the bonds to the officers of the company on the ground that they were not legally elected, they being officers *de facto* of the company.<sup>2</sup>

§ 1291. A fundamental change in the nature and character of the enterprise contemplated by a railway company, to which municipal corporations have subscribed and lent their aid, is also treated as sufficient ground for extending relief by injunction, the subscriber to the capital stock being released by such change from the obligation to pay his subscription, when he has not consented to the change. And the procuring of the franchise of another railroad running at right angles with the former, and its construction and operation by the former road, are held to constitute such a change as to warrant a court of equity in enjoining the officers of a municipal corporation from completing their subscription and issuing bonds to the railway company.<sup>3</sup> But the fact that the road has been constructed by an assignee of the company to which the aid was voted has been held insufficient to warrant an injunction against the delivery of the bonds.<sup>4</sup>

§ 1292. Upon a bill by citizens and tax payers to enjoin the authorities of a town from subscribing to the capital stock of a railway company, when the contract of subscription made by the defendant town is by its terms contingent upon like subscriptions being made by other towns, the court will not consider the validity of the subscriptions of such other towns, when it is not shown that the bonds are to be executed or delivered upon any other terms or condi-

<sup>1</sup> *City of Madison v. Smith*, 83 Ind., 502.

<sup>2</sup> *Sauerhering v. Iron Ridge R. Co.*, 25 Wis., 447.

<sup>3</sup> *Neesen v. Town of Port Washington*, 37 Wis., 168; *Perkins v. Same*, *Ib.*, 177. As to the right to enjoin municipal officers from

making a new contract with a railway company changing in effect the terms of the original subscription, without a vote of the citizens, see *Mayor v. Camak*, 75 Ga., 429.

<sup>4</sup> *Lynch v. Eastern, La F. & M. R. Co.*, 57 Wis., 480.

tions than as specified in the agreement entered into with the railway company. Nor will the injunction be granted in such case upon the ground that the subscription by the town authorities should precede the vote of the electors upon the issuing of the bonds, when the statute authorizing the subscription does not expressly declare such intent, and when such a construction does not result by necessary implication.<sup>1</sup>

§ 1293. In Wisconsin a distinction is taken between cases of municipal subscriptions to the capital stock of railway companies, in aid of which taxes may be properly levied, and municipal donations in aid of railways where the county or municipality does not subscribe to the stock, and does not become a part owner of the railway. And while cases of the former class are upheld, the latter, being for a mere donation of municipal aid to a private corporation, are held not to be a legitimate exercise of the taxing power. In conformity with this distinction, therefore, it is held that a court of equity may enjoin municipal officers from issuing the obligations of the municipality to a railway company as a mere donation.<sup>2</sup>

§ 1294. A citizen and tax payer may maintain a bill in behalf of himself and all other tax payers of the state, to enjoin a state treasurer from issuing bonds of the state in aid of a subscription to a railway under an act of the legislature held to be unconstitutional.<sup>3</sup> Where, however, a state treasurer, acting under an unconstitutional law, has appropriated to other purposes funds of the state which have been raised by taxation for the payment of interest upon railroad-aid bonds, a holder of such bonds can not enjoin the treasurer from paying any moneys out of the treasury until he has replaced the amount thus misappropriated.<sup>4</sup>

<sup>1</sup> *Phillips v. Town of Albany*, 28 Wis., 340.

<sup>3</sup> *Galloway v. Jenkins*, 63 N. C., 147.

<sup>2</sup> *Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis., 167.

<sup>4</sup> *Self v. Jenkins*, 71 N. C., 578.

§ 1295. Equity will not entertain a bill for an injunction to restrain the issuing of municipal bonds in aid of a subscription to a railway, when the bonds have been actually issued and delivered to the company, since the proper function of an injunction is to afford only protective relief, and not to correct wrongs or injuries which have already been committed.<sup>1</sup> Where, however, bonds of a municipality have been issued without legal authority in aid of a subscription to the capital stock of a railway company, tax payers of the municipality, whose property the bonds upon their face purport to bind, are entitled to an injunction to prevent the railway company and its officers from selling or otherwise disposing of the bonds.<sup>2</sup>

§ 1296. It has been held in New York, in the absence of any controlling statute, that a tax payer can not maintain a bill for an injunction against the official custodian of the proceeds of a municipal tax levied by an official board in payment of an indebtedness against a municipality. Where, therefore, it was sought to enjoin certain railroad commissioners of a town, appointed under an act of legislature, from paying out moneys received by them as the proceeds of a tax levied for the payment of interest upon bonds of the town issued in aid of a railway, the relief was refused, upon the ground that equity has no jurisdiction to control the application of the proceeds of a tax after collection when in the hands of the proper official custodian.<sup>3</sup>

§ 1297. The authorities are somewhat conflicting as to

<sup>1</sup> *Menard v. Hood*, 68 Ill., 121.

<sup>2</sup> *Allison v. Louisville, H. C. & W. R. Co.*, 9 Bush, 247.

<sup>3</sup> *Kilbourne v. St. John*, 59 N. Y., 21; *Kilbourne v. Allyn*, 7 Lans., 352. *Kilbourne v. St. John*, 59 N. Y., 21, may be regarded as embodying the result of the New York authorities upon the jurisdiction of equity in restraint of taxation, independent of statute. But by an act of legislature of 1872, provision

was made for relief in such cases, and the jurisdiction of the courts under this act would seem to be enlarged to the extent of warranting relief in equity to restrain the unauthorized issue of municipal bonds under railway-aid subscriptions. See *Ayers v. Lawrence*, 59 N. Y., 192, reversing S. C., 63 Barb., 454; *Hurlburt v. Banks*, 1 Ab. New Cas., 157.

whether, in an action to enjoin the collection of taxes levied in aid of a municipal subscription to a railway, the railway company should be joined as a party defendant. Upon the one hand, it is held that where citizens and tax payers seek to restrain the collection of municipal taxes levied in aid of such a subscription to capital stock the railway company and its directors are not proper or necessary parties, and that it is error to admit such directors as parties upon their own petition.<sup>1</sup> Upon the other hand it is held that in an action to restrain the collection of taxes levied by a county court for the payment of interest upon such bonds, both the county court which made the subscription and levied the tax and the railway company to which the bonds were issued are necessary parties.<sup>2</sup> So it has been held that the bondholders themselves are proper parties to an action of this nature.<sup>3</sup> And upon principle it is difficult to ascertain any satisfactory reason why such bondholders should not be joined as parties defendant, even though the railway company be omitted, since their interests are directly and seriously jeopardized if the relief be granted. And where the bill seeks to have the subscription canceled and the bonds surrendered up, the railway company is a necessary party to the action, as well as an agent of the county by whom the bonds are held for negotiation.<sup>4</sup> So in an action brought by tax payers to restrain the issuing of bonds by a city in payment for a work of local improvement of a public nature, which is under the control and management of a board of commissioners, the city as such and the board intrusted with the duty of making the improvement are necessary parties.<sup>5</sup>

<sup>1</sup> *Jager v. Doherty*, 61 Ind., 528.

<sup>4</sup> *State v. Callaway Co. Court*, 51

<sup>2</sup> *State v. Sanderson*, 54 Mo., 203.

Mo., 395.

<sup>3</sup> *Board v. Texas & P. R. W. Co.*,  
46 Tex., 316.

<sup>5</sup> *Hurlburt v. Banks*, 1 Ab. New  
Cas., 157.

## IV. PARTIES.

- § 1298. Special injury requisite; tax payers proper plaintiffs.
- 1299. The rule illustrated.
- 1300. Further illustrations.
- 1301. Limitations upon right of tax payers to relief.
- 1302. Tax payer must sue in good faith.
- 1303. Information by attorney-general.
- 1304. The same.
- 1305. Joinder of tax payers as plaintiffs.
- 1306. Injunction against receipt of municipal warrants.
- 1307. Injunction against payment of salaries.

§ 1298. The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff, to institute an action for the purpose of restraining misconduct on the part of municipal corporations or their officers, is one of much practical importance and deserving of special attention. In general it may be said that to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public.<sup>1</sup> And while some conflict of authority exists as to what constitutes such special injury as will warrant a court of equity in interfering, the better doctrine is, that tax payers of a municipal corporation, as a city or county, whose burdens of taxation are increased by the misappropriations of public funds by municipal officers or by other official misconduct on the part of such officers, sustain such special damage as to entitle them to relief.<sup>2</sup> Thus, the en-

<sup>1</sup> *Jones v. Little Rock*, 25 Ark., 301; *City of Chicago v. Union Building Association*, 102 Ill., 379; *Seager v. Kankakee Co.*, 102 Ill., 669; *Hesing v. Scott*, 107 Ill., 600. As to the right of private citizens to enjoin a municipal corporation from carrying out the provisions of an ordinance providing for a

supply of water by a foreign corporation, see *Dodge v. City of Council Bluffs*, 57 Iowa, 560.

<sup>2</sup> *Mayor v. Gill*, 31 Md., 375; *Harney v. Indianapolis R. Co.*, 32 Ind., 244; *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn., 48; *Sinclair v. Commissioners of Winona Co.*, 23 Minn., 404; *City of Springfield v.*

forcement of a city ordinance which is unconstitutional and void, and which seeks to impose a debt upon the city, may be enjoined by property owners and tax payers of the city.<sup>1</sup> So where a board of county commissioners are proceeding without authority of law to appropriate county funds in aid of the construction of a railway, a tax payer of the county has such an interest in the public funds as enables him to maintain a bill for an injunction.<sup>2</sup> And since the municipal government of a city or town is intrusted with the control and disposition of municipal affairs for the benefit and protection of its citizens and tax payers, they are proper parties to a bill for an injunction against the improper exercise of municipal authority.<sup>3</sup>

Edwardes, 84 Ill., 626; Winston v. Tennessee & P. R. Co., 1 Baxter, 60; Matthis v. Town of Cameron, 62 Mo., 504; Pittsburg's Appeal, 79 Pa. St., 317; Warren Co. Agricultural Joint Stock Company v. Barr, 55 Ind., 80; Rothrock v. Carr, 55 Ind., 334; Dent v. Cook, 45 Ga., 323; Wagner v. Meety, 69 Mo., 150; Willard v. Comstock, 58 Wis., 565; Peter v. Prettyman, 62 Md., 566; Davenport v. Kleinschmidt, 6 Mont., 502. But see, *contra*, Craft v. Jackson Co., 5 Kan., 518.

<sup>1</sup> Mayor v. Gill, 31 Md., 375.

<sup>2</sup> Harney v. Indianapolis R. Co., 32 Ind., 244. Frazer, C. J., delivering the opinion, says: "But it is contended that a tax payer has no such interest in the funds belonging to the county treasury as will enable him to maintain a suit to prevent unlawful appropriations thereof. We can not regard this question as open to further discussion in this court. It has been a common remedy in this state, and has been sanctioned by repeated judgments here. Lafayette v. Cox, 5 Ind., 38; Oliver v. Keightley, 24

Ind., 514. It has been sanctioned elsewhere. New London v. Brainard, 22 Conn., 552. It is sanctioned by established principles, acted upon and recognized everywhere. The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year, and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction can not be well conceived than that in which a tax payer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish. See Gifford v. N. J. R. Co., 2 Stockt., 171."

<sup>3</sup> Milhau v. Sharp, 15 Barb., 193; Stuyvesant v. Pearsall, *Ib.*, 244; Christopher v. Mayor, 13 Barb., 567.

§ 1299. In conformity with and in illustration of the general doctrine thus stated, it is held that any tax payer of a county has sufficient interest in the subject-matter involved to constitute him a proper party to institute an action to enjoin the issuing of county bonds in aid of an illegal subscription to a railway company, and to restrain the assessment and collection of taxes with which to pay the principal and interest of such bonds.<sup>1</sup> So a tax payer of a county may enjoin an illegal appropriation of the county funds by a board of commissioners to a private corporation.<sup>2</sup> And citizens and tax payers of a county may in like manner enjoin an illegal and unauthorized donation of funds by a board of county commissioners in aid of the erection of a school house.<sup>3</sup> So citizens and tax payers of a county may enjoin, until a final hearing upon the merits, the payment of county bonds alleged to have been issued without legal authority in aid of the building of a jail.<sup>4</sup>

§ 1300. As still further illustrating the general doctrine that tax payers of a municipal corporation are proper parties to invoke the preventive aid of equity in restraint of illegal action on the part of the municipality or its officers, it is held that a citizen and tax payer has such an interest in the subject-matter as to entitle him to an injunction to prevent the authorities of a municipal corporation from incurring indebtedness in excess of the maximum fixed by the constitution of the state as the limit beyond which municipal indebtedness shall not be incurred.<sup>5</sup> So a tax payer of a municipal corporation is a proper party complainant to a bill for an injunction against the municipality to prevent the payment of a judgment alleged to be void, when such payment would result in increasing the burdens of municipal taxation.<sup>6</sup> And when a municipal corporation,

<sup>1</sup> *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60.

<sup>4</sup> *Dent v. Cook*, 45 Ga., 323.

<sup>2</sup> *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30.

<sup>5</sup> *City of Springfield v. Edwards*, 84 Ill., 626.

<sup>3</sup> *Rothrock v. Carr*, 55 Ind., 334.

<sup>6</sup> *Matthis v. Town of Cameron*, 62 Mo., 504.



acting in excess of its authority and power, is proceeding to carry into execution the terms of an ordinance for the annexation of contiguous territory to the municipality, a citizen and tax payer, whose taxes would be increased by the proposed action, may maintain a bill for relief by injunction.<sup>1</sup>

§ 1301. Although the general doctrine that tax payers are proper parties to invoke equitable relief against misconduct upon the part of municipal authorities is thus seen to be well established, it is not to be understood that they are entitled to maintain an action in all cases of this nature, regardless of their personal interest, or of the degree of injury which they may sustain. And where, under a general power in a city charter to establish and regulate markets, the corporate authorities of the city are about to remove a market house, tax payers, as such, have no sufficient ground for enjoining the removal, whatever may be the rights of adjacent proprietors and others injuriously affected thereby.<sup>2</sup> So a tax payer in a city, who files a bill in behalf of himself and other tax payers to enjoin the city from selling a public park or square, is not entitled to the relief when he has no land abutting upon the square, and when he has no private interest involved other than or different from the body of tax payers.<sup>3</sup> So private citizens or property owners, whose property is located upon a public street at a considerable distance from a point where it is proposed to vacate or close the street, and who will sustain no special injury by reason of such action, different from that sustained by the public at large, are not entitled to relief by injunction.<sup>4</sup> And equity will not, at the suit of private citizens and tax payers sustaining no special injury, restrain

<sup>1</sup> Pittsburg's Appeal, 79 Pa. St., 317.

<sup>2</sup> Gall v. Cincinnati, 18 Ohio St., 563.

<sup>3</sup> Tift v. City of Buffalo, 65 Barb., 460.

<sup>4</sup> City of Chicago v. Union Building Association, 102 Ill., 379; Hesing v. Scott, 107 Ill., 600; McGee's Appeal, 114 Pa. St., 470.

municipal officers from issuing a dram-shop license without a petition of a majority of the voters as required by law.<sup>1</sup>

§ 1302. The general rule, as stated in the preceding sections, is also to be understood as limited to cases where the action is instituted by the tax payer in good faith, and for the protection of his own interest. And where a tax payer seeks to restrain an alleged waste or injury to the property of a city, equity will not extend him relief when it is shown that the action is not brought in good faith for the protection of his own interest, but that he is merely a colorable plaintiff, suing in behalf of other parties in interest.<sup>2</sup>

§ 1303. Where the injury which it is sought to enjoin is of a public nature, relief is sometimes sought by an action instituted in the name of the attorney-general. And where under an act of parliament lands are directed to be placed and kept in proper condition for purposes of public recreation, the municipal authorities having charge of such lands may be enjoined from diverting them to another and different use without authority of law, upon an information filed by the attorney-general.<sup>3</sup> Where, however, a tax has been voted, levied and paid by the electors of a township for the purchase of lands to be used as a public common, without objection from any source, and the land has been conveyed to the township upon the faith of such proceedings, and a portion of the purchase money has been paid, there being no abuse of corporate authority and no excess of power shown, equity will not enjoin the payment of the residue of the purchase money upon an information filed by the attorney-general at the relation of a citizen.<sup>4</sup>

§ 1304. In New York it is held that where the act of a municipal corporation which it is sought to enjoin injuriously affects the public at large or the entire community over which the corporate jurisdiction extends, the attorney-

<sup>1</sup> *Seager v. Kankakee Co.*, 102 Ill., 669.

<sup>2</sup> *Hull v. Ely*, 2 Abb. New Cas., 440.

<sup>3</sup> *Attorney-General v. Mayor*, 1 Gif., 363.

<sup>4</sup> *Attorney-General v. Burrell*, 31 Mich., 25.

general is a necessary party to the prosecution of the action, as in a case where it is sought to restrain the authorities of a city from granting a franchise to lay a street railway, the relief being sought upon the ground of excess of power and breach of trust.<sup>1</sup> And in Missouri it is held that the state may, through its public prosecutor, maintain a bill for an injunction against the authorities of a municipal corporation to prevent a subscription to the capital stock of a railway company, when such authorities are proceeding in violation of the constitution and laws of the state. And a distinction is drawn between a proceeding by injunction against a public corporation in such case, and a proceeding against a private corporation where *quo warranto* affords ample remedy for an abuse or misuser of the corporate franchises. Indeed, the doctrine is asserted in broad and general terms, that the state may, through its public prosecutor, maintain a bill to enjoin public or municipal corporations from acting in violation of the constitution and laws of the state.<sup>2</sup> In New York, however, it is held that the attorney-general can not maintain an action to restrain commissioners appointed under an act of legislature from issuing the bonds of a town, authorized by such act, in payment of the stock of a railway company.<sup>3</sup>

§ 1305. As regards the joinder of different tax payers as parties complainant in an action to enjoin municipal officers from the commission of a threatened act, it is held

<sup>1</sup> *Davis v. Mayor*, 2 Duer, 663. And see this case for a full discussion of the English and American cases upon the power to institute the proceedings in behalf of the public or by the attorney-general. But see *People v. Lowber*, 7 Ab. Pr., 158, where it is said that, if it be conceded that the attorney-general may bring an action in the name of the people to enjoin a municipal corporation, it can only be allowed for the purpose of prevent-

ing a fraudulent and illegal disposition of the corporate property.

<sup>2</sup> *State v. Saline Co. Court*, 51 Mo., 350; *State v. Hager*, 91 Mo., 452. And see *State v. Saline Co. Court*, 51 Mo., 350, for a full discussion of the English and American cases upon the right of the attorney-general to maintain such an action. See also *State v. Callaway County Court*, 51 Mo., 395.

<sup>3</sup> *People v. Miner*, 2 Lansing, 396.

that two or more tax payers, having no unity of interest except such as is common to all tax payers of the municipality, can not unite in maintaining such action, their property being owned in severalty and their interests being separate and distinct.<sup>1</sup>

§ 1306. An injunction will not issue to prevent a municipal corporation from the performance of its duties, upon the application of a person without interest in the subject-matter; and if, in such a case, the municipality acquiesces in a proceeding for an injunction, the persons interested in the performance of the duty which it is sought to enjoin may raise the objection of want of interest in the complainants. Where, therefore, a city is required by law to receive in payment of licenses and taxes certain municipal warrants which it has issued, a creditor and tax payer of the city has no such interest as to entitle him to an injunction to prevent the city from receiving such warrants; and the holders of the warrants in such case, being the real parties in interest, may object to the granting of the relief.<sup>2</sup>

§ 1307. Upon a bill in equity against the clerk, auditor and treasurer of a city to enjoin the payment of salaries to police officers, upon the ground that they were not legally appointed, the city itself is a necessary party, and it is error to grant a perpetual injunction in such a case without joining the city as a party to the action.<sup>3</sup>

<sup>1</sup> Wood v. Bangs, 1 Dakota, 179. City of New Orleans, 27 La. An.,

<sup>2</sup> Louisiana National Bank v. 446.

<sup>3</sup> Samis v. King, 40 Conn., 298.

## CHAPTER XXII.

### OF INJUNCTIONS AGAINST PUBLIC OFFICERS.

- § 1308. The general doctrine stated.
1309. Relief allowed where authority exceeded; letting contract to lowest bidder.
1310. Violation of plain official duty ground for relief.
1311. Action of official boards not reviewed in equity.
1312. Title to office not determined in equity.
1313. The doctrine illustrated.
1314. Fees and emoluments of office.
1315. Possession of officers *de facto* protected.
1316. Holding elections.
1317. Effect of injunction upon *mandamus*.
1318. Opening road across works of railway.
1319. Creation of new county.
1320. Excess of power by drainage commissioners.
1321. Tax payers proper parties.
1322. State courts will not enjoin United States officers; revenue officers.
1323. President of United States will not be enjoined.
1324. Alterations in stream; public improvements.
1325. Taking private property; sheriff acting under process.
1326. Executive and state officers, when enjoined.
1327. Acting under unconstitutional law.
1328. Injunction in aid of *mandamus*; payment of money.
1329. Board of medical examiners.

§ 1308. The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to act for the public as is not susceptible of reparation in the ordinary course of proceedings at law. And it may be stated as a general rule, that when public officers, under color and claim of right, are proceeding to impair either public or private rights, or when their proceedings will result in serious injury to private citizens, without any corresponding benefit to the public, or when the

aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed.<sup>1</sup> Thus, commissioners acting under color of law, and proceeding without any real legal authority to permanently appropriate the land of a private citizen to a purpose connected with a work of internal improvement, may be enjoined from proceeding with such appropriation. And in such a case it is no answer to say that the land, independent of the use to which it is to be put in making the improvement, would be of little value, or that the injury to the owner would be trivial by allowing the work to proceed.<sup>2</sup>

§ 1309. In applications for relief by injunction against the acts of public officers the determining point is, ordinarily, whether they are acting within the scope of their authority, or whether they are transcending that authority. And while equity will not interfere while such officers are acting within the authority conferred upon them by law, to determine whether their action is good or bad, yet if they assume powers over property which do not belong to them, and infringe upon or violate the rights of citizens under pretense of such assumed authority, equity has jurisdiction to interfere for the protection of the citizen. Where, therefore, commissioners of drainage appointed under an act of parliament are acting in excess of their authority; to the injury of private rights, equity may interpose by injunction.<sup>3</sup> And it has been held that where such commissioners, although acting within the scope of their authority, conduct their works in so negligent and expensive a manner that an action for negligence would lie by the proprietors against the commissioners, equity may grant an injunction.<sup>4</sup> So when public officers are required to let contracts for

<sup>1</sup> *Green v. Green*, 34 Ill., 320; *Morehead v. Little Miami R. Co.*, 17 Ohio, 340; *Anderson v. Commissioners*, 12 Ohio St., 635.  
*hawk & H. R. Co. v. Artcher*, 6 Paige, 83; *Oakley v. Trustees*, *Ib.*, 262. And see *Green v. Oakes*, 17 Ill., 249, and cases cited; *Blanton v. Southern F. Co.*, 77 Va., 335.  
<sup>2</sup> *McArthur v. Kelley*, 5 Ohio, 139;  
<sup>3</sup> *Foster v. Hornsby*, 2 Ir. Ch., 426.  
<sup>4</sup> *Stubber v. Hornsby*, 2 Ir. Ch., 449.

public work to the lowest responsible bidders, after due notice, but proceed to let contracts without complying with the law in this regard, they may be enjoined from issuing vouchers in payment of money due under such contracts.<sup>1</sup>

§ 1310. When a plain, official duty, requiring the exercise of no discretion, is incumbent and obligatory upon a state officer, he may be enjoined from acting in violation of such duty by one who will thereby sustain a personal injury for which adequate compensation can not be had at law. And the relief by injunction, in such a case, is regarded as correlative to that by *mandamus* when sought to compel the performance of an official duty, as to which no element of discretion exists. Thus, where a board of state officers are appointed by law to fund the debt of the state in new bonds to be issued to creditors upon condition of their reducing their demands forty per cent., and accepting sixty per cent. in the new bonds in satisfaction of their claims against the state, a creditor who has thus reduced his demand and accepted the new bonds is entitled to the aid of an injunction, to restrain such board from violating their duty by issuing to a creditor the new bonds in full for his debt without reduction.<sup>2</sup>

§ 1311. It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction, nor will they review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law, by writ of *certiorari*.<sup>3</sup> So where

<sup>1</sup> *Little v. Jayne*, 124 Ill., 123.

<sup>2</sup> *Board of Liquidation v. McComb*, 2 Otto, 531.

<sup>3</sup> *Mooers v. Smedley*, 6 Johns. Ch., 28; *Mayor v. Meserole*, 26 Wend., 132, reversing S. C., 8 Paige, 198; *Van Doren v. Mayor*, 9 Paige, 388; *Livingston v. Hollen-*

*beck*, 4 Barb., 10; *Bouton v. Brooklyn*, 15 Barb., 375; *Gillespie v. Broas*, 23 Barb., 370; *Hyatt v. Bates*, 40 N. Y., 164. In *Mooers v. Smedley*, 6 Johns. Ch., 28, Kent, Chancellor, observes: "I can not find by any statute, or precedent, or practice, that it belongs to the

commissioners of roads and highways are by law intrusted with full jurisdiction over matters pertaining to changes in the roads, a court of equity will not interfere with the exercise of their discretion, unless a strong case of fraud or irreparable injury is shown. And where they have exercised their discretion and made their decision in good faith, and without any intention of oppressing or injuring private persons, an injunction will not be allowed against their action.<sup>1</sup> But a ministerial officer, whose rights and powers are conferred by statute upon certain conditions, may be enjoined from acting contrary to authority, if his acts are likely to result in public injury, such a case being distinguishable from that of a municipal corporation exercising legislative functions or discretionary powers.<sup>2</sup>

§ 1312. No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto*.<sup>3</sup> Thus, equity

jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors in their examination and allowance of accounts and causing the money to be raised; \* \* the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions and in the official acts of public officers, belongs to the supreme court. \* \* It has al-

ways been a matter of legal and never a matter of equitable cognizance."

<sup>1</sup> Warfel v. Cochran, 34 Pa. St., 381.

<sup>2</sup> Lane v. Schomp, 5 C. E. Green, 82.

<sup>3</sup> People v. Draper, 24 Barb., 265; S. C., 4 Ab. Pr., 322, 14 How. Pr., 233; Moulton v. Reid, 54 Ala., 320, reversing S. C. *sub nom.* Reid v. Moulton, 51 Ala., 255; Beebe v.



will not interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. And a temporary injunction granted *pendente lite*, and until the question of the validity of the law under which defendants claim their offices can be determined, will be dissolved.<sup>1</sup> So it is held that a court of chancery

Robinson, 52 Ala., 66, overruling Bruner v. Bryan, 50 Ala., 522; Planters Company Association v. Hanes, 52 Miss., 469; Tappan v. Gray, 9 Paige, 507, affirmed 7 Hill, 259; Sheridan v. Colvin, 78 Ill., 237; Patterson v. Hubbs, 65 N. C., 119; Jones v. Commissioners of Granville, 77 N. C., 280; Colton v. Price, 50 Ala., 424; Delahanty v. Warner, 75 Ill., 185; Dickey v. Reed, 78 Ill., 261; McAllen v. Rhodes, 65 Tex., 348; Gilroy's Appeal, 100 Pa. St., 5; Kilpatrick v. Smith, 77 Va., 347; Neeland v. State, 39 Kan., 154; Willeford v. State, 43 Ark., 62; *Ex parte* Wimberly, 57 Miss., 437. See also State v. Duffel, 32 La. An., 649. But see Kerr v. Trego, 47 Pa. St., 292, where it was held that a preliminary injunction was proper when two different bodies were claiming to act as the common council of a city, upon the ground that the acts in question were contrary to law and prejudicial to the interests of the public, and because no adequate remedy could be had at law.

<sup>1</sup> People v. Draper, 24 Barb., 265; S. C., 4 Ab. Pr., 322, 14 How. Pr., 233. This was an action brought by the attorney-general in behalf of the people, to determine the right of defendants to the offices of police commissioners of the city of

New York, plaintiff relying on the invalidity of the law under which defendants derived their appointment. A temporary injunction having been granted restraining the defendants, *pendente lite*, from exercising any of the functions of their offices, it was dissolved on the ground that the case was not one demanding equitable relief. Peabody, J., says: "I am inclined to think that such relief has not been deemed consistent with the interest of the state, with enlightened public policy, or with the general principles which must govern as to an office emanating from the sovereign power, and that hence it has never been adopted in practice; that the public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform the duties of it for the time being, even though his title to the office were doubtful; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in and ready to perform the duties of it were there rightfully, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being

has no jurisdiction to restrain an official board of canvassers from canvassing the returns of an election.<sup>1</sup> And when a special tribunal is created by law for determining contested elections, its jurisdiction over such matters is conclusive, and a court of equity has no power to enjoin proceedings before such tribunal; and such an injunction is treated as absolutely void and it may be disregarded without incurring a contempt of court.<sup>2</sup> So where a specific remedy by *quo warranto* exists at law for the unlawful usurpation of an office by one not entitled thereto, a court of equity will not entertain jurisdiction of the offense, and will not grant an injunction against the incumbent of the office.<sup>3</sup> Especially will the court refuse to interfere where the answer fully denies the equity of the bill, and shows satisfactorily that defendant has a legal right to the office in question.<sup>4</sup> Nor will the right to an office in an incorporated company be tried upon an application for an injunction; nor will one who has been wrongfully removed from such an office be restored by injunction.<sup>5</sup>

§ 1313. In conformity with the general doctrine as above stated, it is held that one who has been duly appointed and commissioned to fill a vacancy in a public office will not be restrained from entering upon the discharge of his duties upon the application of another claimant to the office, but such claimant will be left to pursue his legal remedy.<sup>6</sup>

in—even if wrongfully—no one else can enter until he is removed, and he must act, or no one can. And it is not at all difficult to see that in very many and most cases, the public interest would require that the duties of an office should not be suspended, and its functions cease, until the matter of personal right between rival claimants could be determined.”

<sup>1</sup> Willeford v. State, 43 Ark., 62; Dickey v. Reed, 78 Ill., 261.

<sup>2</sup> *Ex parte* Wimberly, 57 Miss.,

437. See also Dickey v. Reed, 78 Ill., 261.

<sup>3</sup> Hagner v. Heyberger, 7 Watts & S., 104; Updegraff v. Crans, 47 Pa. St., 103. It is to be observed that the equity powers of the courts in the State of Pennsylvania are defined by statute as extending to the prevention of acts contrary to law.

<sup>4</sup> Maryland v. Jarrett, 17 Md., 309.

<sup>5</sup> Sherman v. Clark, 4 Nev., 138.

<sup>6</sup> Beebe v. Robinson, 52 Ala., 66, overruling Bruner v. Bryan, 50

Nor will a court of equity entertain a bill by a former incumbent of a public office, claiming to be re-elected, to enjoin his opponent from using his certificate of election, or from qualifying and entering upon the discharge of his duties, even though gross frauds in the election are alleged by the bill.<sup>1</sup> And where the authorities of a city have removed from his office a superintendent of streets, he can not maintain a bill to enjoin them from appointing a successor and from interfering with plaintiff in the discharge of his duties, the appropriate remedy in such case being by proceedings in *quo warranto*.<sup>2</sup> So in a proceeding in the nature of *quo warranto* to determine the title of defendants to certain public offices, such as mayor and aldermen of a city, it is not sufficient ground for restraining defendants from exercising their official functions to allege that they were not regularly or properly elected.<sup>3</sup>

§ 1314. The general principle as above stated and illustrated, denying relief in equity for the purpose of determining disputed questions of title to public offices, is also applied to cases where it is sought by injunction to restrain the collection of the fees and emoluments pertaining to an office, pending a contest as to the title. And it may be affirmed as a general and well established rule that equity will not lend its interference in a contest between conflicting claimants to an office to enjoin the incumbent *de facto* from receiving the salary, fees or emoluments pertaining to such office, since such interference would, in effect, practically decide the disputed questions of title involved, and would thus usurp to a court of equity, through its preventive remedy by injunction, a jurisdiction which can only be exercised in a legal forum.<sup>4</sup> And the fact that the fees

Ala., 522. The court say, p. 73: "We can hardly conceive a more improper use of the extraordinary writ of injunction."

<sup>1</sup> Moulton v. Reid, 54 Ala., 320, reversing S. C., *sub nom.* Reid v. Moulton, 51 Ala., 255.

<sup>2</sup> Delahanty v. Warner, 75 Ill., 185.

<sup>3</sup> State v. Wolfenden, 74 N. C., 103.

<sup>4</sup> Tappan v. Gray, 9 Paige, 507, affirmed 7 Hill, 259; Stone v. Wetmore, 42 Ga., 601; Colton v. Price,

and emoluments of the office may be recovered in an action at law by the person actually entitled is a sufficient bar to relief in equity, when it is not shown that the action at law would be ineffectual.<sup>1</sup> Nor will a court of equity interfere by injunction in such case, even though it should be of opinion that defendant has intruded himself into an office to which he is not entitled, such questions being foreign to the well defined jurisdiction of equity.<sup>2</sup>

§ 1315. While, as is thus shown, courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers *de facto*, by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. Thus, equity will refuse to enjoin officers *de facto* from exercising the duties and functions pertaining to their office, pending a litigation in the nature of *quo warranto* to determine their title, such refusal being based upon a recognition of that element of public interest which requires that some one should continue to exercise the duties of a public office, pending a litigation as to its title.<sup>3</sup> Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. Thus, the officers *de facto* of a school district may restrain persons claiming to be officers *de jure*, but who are not in possession, from taking possession of the school house, and from interfering with plaintiffs in their employment of teachers and in their management of school affairs; and this, notwithstanding the fact that

50 Ala., 424; McAllen v. Rhodes, 65 Tex., 348. And see Peet v. White, 43 Iowa, 400, where an injunction was refused which was sought to restrain the clerk of a court from paying over to his predecessor fees accruing during the official term of such predecessor.

<sup>1</sup> Colton v. Price, 50 Ala., 424.

<sup>2</sup> Tappan v. Gray, 9 Paige, 507, affirmed 7 Hill, 259.

<sup>3</sup> State v. Durkee, 12 Kan., 308.

the defendants thus enjoined claim to be the legally elected officers, and have instituted proceedings in *quo warranto* to establish their title. And the granting of an injunction in such case in no manner determines the questions of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established.<sup>1</sup>

§ 1316. Equity will not enjoin the holding of an election for a public office at the suit of citizens and electors who fail to show in what manner they will be injured by such election, either in person or property. Plaintiffs, in such case, are to be regarded as mere volunteers, having no right to invoke the extraordinary aid of equity in a matter in which they have no interest other than that which is common to the public at large. And such a case may be regarded as analogous to that of private citizens attempting to enjoin a public nuisance without showing some special injury, peculiar to themselves, and aside from the general injury to the public.<sup>2</sup> Indeed, a still broader doctrine has been asserted and it has been held that, the power of holding an election being a political power, equity has no jurisdiction to restrain officers intrusted by law with the duty of holding elections from the exercise of such power.<sup>3</sup>

§ 1317. An injunction restraining a public officer from performing a particular act will not be allowed to have the effect of preventing the performance of the act, under a peremptory writ of *mandamus* previously granted by a court of competent jurisdiction. Thus, where a county judge is directed by a peremptory *mandamus* to issue county bonds in aid of a subscription to a railway, a subsequent injunction restraining him from issuing such bonds presents no obstacle to the enforcement of the *mandamus*.<sup>4</sup> But the effect of an injunction restraining a public officer from doing an official act is to protect him from subsequent

<sup>1</sup> *Brady v. Sweetland*, 13 Kan., 41.

<sup>4</sup> *Cumberland & O. R. Co. v.*

<sup>2</sup> *Jones v. Black*, 48 Ala., 540.

Judge of Washington County

<sup>3</sup> *Harris v. Schryock*, 82 Ill., 119. Court, 10 Bush, 564.

proceedings by *mandamus* to compel the doing of the act enjoined. Thus, where a town treasurer is restrained by injunction from paying over certain moneys collected by him in his official capacity, a writ of *mandamus* will not lie to compel him to make the payment.<sup>1</sup>

§ 1318. The fact that persons injured by the acts of public officers have a possible remedy at law will not deprive them of relief in equity. And where public officers are proceeding illegally and improperly, under color and claim of right, to open a private road across the works of a railway company, an injunction may be granted, although complainants might have lain by until the road was completed, and then recovered damages at law for injuries sustained, equitable relief being granted in such case on the ground of preventing a multiplicity of suits.<sup>2</sup>

§ 1319. Commissioners appointed under an act of legislature for the purpose of creating a new county, which is held to be in violation of the constitution of the state, may be perpetually enjoined from proceeding, notwithstanding the common law remedy by *quo warranto*, the legal remedy being manifestly inadequate to meet the necessities of such a case, since it can not operate prospectively or prevent the threatened action. The interposition of equity under such circumstances is based upon the doctrine of *quia timet* and the necessity of preventing irreparable mischief.<sup>3</sup> If, however, the county has been fully organized and put into operation under the act of the legislature establishing it, a court of chancery has no power to abolish it, or to restrain its officers from performing their functions.<sup>4</sup>

§ 1320. Where inspectors, appointed in pursuance of a law of the state for the drainage of swamp lands, exceed their powers, thereby causing injury to neighboring mill

<sup>1</sup> State v. Kisbert, 21 Wis., 387.      Kingston v. Livingston, 6 Johns. Ch.,

<sup>2</sup> Mohawk & H. R. Co. v. Artcher, 497.

6 Paige, 83. And see Belknap v.      <sup>3</sup> Bradley v. Commissioners, 2  
Belknap, 2 Johns. Ch., 463; Liv-      Humph., 428.

<sup>4</sup> Ford v. Farmer, 9 Humph., 152.

owners in the enjoyment of the water for their mills, an injunction may be allowed, even though an action of trespass would lie, since the case is not one of an ordinary trespass, but the injury is continuing in its nature, and the interposition of equity is needed to prevent permanent mischief and a multiplicity of suits.<sup>1</sup> So commissioners for the drainage of swamp lands, appointed under an act of legislature which is held to be unconstitutional and void, may be enjoined from proceeding under the act by the owners of land who are aggrieved thereby.<sup>2</sup>

§ 1321. He who seeks to restrain improper or unlawful conduct on the part of public officers must allege sufficient facts to show that he has such an interest in the public welfare as to make him a proper party to prevent the commission of a public wrong. It will generally suffice that the persons seeking the injunction are residents and tax payers. Thus, it is held that complainants, who are voters and tax payers in a county, are proper parties to enjoin unauthorized expenditures of county funds by a county judge.<sup>3</sup> But to warrant the relief in behalf of citizens and tax payers against acts of public officers, it should be shown that plaintiff's rights will be greatly and irreparably injured by the acts which it is sought to enjoin, and unless this is shown the relief will be denied.<sup>4</sup> And an injunction will not be granted to restrain county officers from removing their offices to another location, at the suit of one who does not show himself to be a resident and voter of the county, and who shows no interest in the result of the controversy.<sup>5</sup>

§ 1322. The state courts have no jurisdiction or power to interfere by injunction with officers of the United States in the discharge of their duties under an act of Congress. They will not, therefore, assume jurisdiction to enjoin a re-

<sup>1</sup> *Belknap v. Belknap*, 2 Johns. Ch., 463.

<sup>2</sup> *Hartwell v. Armstrong*, 19 Barb., 166.

<sup>3</sup> *Rice v. Smith*, 9 Iowa, 570.

<sup>4</sup> *Normand v. Otoe Co.*, 8 Neb., 18. And see *Caruthers v. Harnett*, 67 Tex., 127.

<sup>5</sup> *Henderson v. Marcell*, 1 Kan., 137.

ceiver or register of a United States land office from making a sale of certain lands as public lands of the United States, which are claimed by plaintiff as his own property, there being no power outside of the federal government to interfere with such proceedings for the purpose of restraining the action of such officers in making a sale.<sup>1</sup> Nor will a federal court enjoin officers of the government from the enforcement of the laws relating to the collection of internal revenue, when the relief is invoked merely upon the fears and apprehensions of plaintiff that such enforcement will injure his business, no right of plaintiff having been actually interfered with.<sup>2</sup>

§ 1323. A bill for an injunction will not lie against the President of the United States, to prevent him from executing a law of Congress, on the ground of its unconstitutionality, since the judicial department of the government has no power to interfere with the executive in the performance of his official duties. Nor will a bill of such a nature be entertained in a court of equity because it describes the President as a citizen of a state.<sup>3</sup>

§ 1324. An injunction will not be granted in behalf of a riparian owner to restrain the agents of the government from making alterations in a navigable stream, where the alleged injury is mere matter of opinion and is denied by defendants. But it would seem that where Congress intrusts an appropriation for public improvements to one of the departments, which in turn employs agents to do the work, this department and its agents may be enjoined from doing the work in an improper manner, although an injunction would not lie against the United States.<sup>4</sup>

§ 1325. Public officers, acting under authority of a state, will not be restrained from taking private property for works of public improvement until suitable compensation is

<sup>1</sup> *Brewer v. Kidd*, 23 Mich., 440.

<sup>4</sup> *Avery v. Fox*, 1 Abb. U. S. R.,

<sup>2</sup> *Mason v. Rollins*, 2 Bissell, 99. 246.

<sup>3</sup> *Mississippi v. Johnson*, 4 Wal., 475. And see § 1326, *post*.



made for the property taken, where a mode is provided by law for the assessment of the damages sustained.<sup>1</sup> Nor will equity lend its aid to enjoin a sheriff from proceeding under process of the court, where the injunction is sought merely to aid complainant in a proceeding at law which is unwarranted and oppressive.<sup>2</sup>

§ 1326. Delicate and interesting questions have frequently arisen touching the extent to which the judiciary may interfere with the executive department of the government, either state or national, and the jurisdiction of equity to enjoin the acts of officers whose duties partake of an executive or *quasi* executive character. The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officer. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer, as distinguished from a merely ministerial duty, its performance will not be prevented by injunction.<sup>3</sup> As illustrating this distinction it is held that the secretary of the interior and the commissioner of the land office will not be enjoined from canceling an entry under which citizens claim an equitable interest in certain lands, the act of the officers in such case requiring the exercise of judgment and discretion, in distinction from a purely ministerial duty.<sup>4</sup> So an injunction will not lie to restrain the governor or other executive officers of a state from the performance of official acts in their executive capacity.<sup>5</sup>

<sup>1</sup> *Heston v. Canal Commissioners*, Brightly, 183.

<sup>2</sup> *Haight v. Executors*, 2 Green Ch., 386. "I can not," says Vroom, Chancellor, in this case, "restrain a public officer acting under the writ of this court, for the purpose of aiding the complainants in what I consider an unlawful proceeding in a court of law."

<sup>3</sup> *Gaines v. Thompson*, 7 Wal.,

347; *Scofield v. Perkerson*, 46 Ga., 350; S. C., 46 Ga., 325; *Western R. Co. v. De Graff*, 27 Minn., 1; *Secombe v. Kittelson*, 29 Minn., 555; *Western Star Lodge v. Schminke*, 4 McCrary, 366.

<sup>4</sup> *Gaines v. Thompson*, 7 Wal., 347. And see *Brem v. Houck*, 101 N. C., 627.

<sup>5</sup> *Western R. Co. v. De Graff*, 27 Minn., 1; *Secombe v. Kittelson*, 29

Nor will a postmaster be enjoined from obeying an order of the postmaster-general directing the removal of a post-office, the power to make such removal being vested by law in the postmaster-general, to be exercised in his discretion.<sup>1</sup> And where an executive officer of a state is empowered by law to issue execution against defaulting officers of railway companies and their sureties, the issuing of such execution being an act of the executive department of the government, and such department having exclusive jurisdiction over the particular subject-matter, the exercise of that jurisdiction will not be interfered with by injunction.<sup>2</sup> Nor will state officers be restrained from enforcing a law of the state merely upon the ground of its alleged unconstitutionality; especially when plaintiff shows no injury to himself as likely to result from the enforcement of the law.<sup>3</sup> And in general it may be said that the courts will not interfere by injunction to restrain officers of a state from compliance with a law of the state requiring the performance of a public duty at their hands. They will not, therefore, enjoin such officers from receiving bids for a public loan and issuing stock therefor, when such duty is imposed upon them by law; even though the law under which they are acting is alleged to be unconstitutional.<sup>4</sup> Nor will a federal court entertain a bill for an injunction to compel state officers to execute a law of the state.<sup>5</sup> Upon the other hand, if the acts which it is sought to restrain are of a strictly ministerial as distinguished from an executive or political nature, the fact that they have been committed to executive officers, such as the governor of a state, or a state auditor, will

Minn., 555; *Bates v. Taylor*, 87 Tenn., 319.

<sup>1</sup> *Western Star Lodge v. Schminke*, 2 McCrary, 366.

<sup>2</sup> *Scofield v. Perkerson*, 46 Ga., 350; S. C., 46 Ga., 325.

<sup>3</sup> *Gibbs v. Green*, 54 Miss., 593.

<sup>4</sup> *Thompson v. Commissioners of Canal Fund*, 2 Ab. Pr., 248. And

an injunction has been refused which was sought to restrain state officers from violating an alleged contract with plaintiffs for furnishing text books for the use of the schools of the state. *Bancroft v. Thayer*, 5 Sawy., 502.

<sup>5</sup> *McCauley v. Kellogg*, 2 Woods, 13.

not prevent relief by injunction in a proper case.<sup>1</sup> But a secretary of state will not be enjoined from issuing a grant of lands to defendants, which lands are claimed by plaintiff, who shows no right or title in himself which is invaded by defendants.<sup>2</sup>

§ 1327. While the jurisdiction of equity to restrain public officers, at the suit of the people, from proceeding in violation of law to the prejudice of the public is recognized and well established, such officers being regarded as trustees of franchises or property for the public benefit, and therefore amenable to the jurisdiction of equity, yet when such suit is instituted in behalf of the state as plaintiff the state is not exempt from the rules applicable to ordinary suitors. A clear right to the relief demanded must, therefore, be shown, and it must appear that some act is done or threatened by defendants which will be destructive of such right. And such officers will not be enjoined from acting under a law which is alleged to be unconstitutional and void, when it is not shown that they intend or propose to act under the law; and the courts will not enjoin in advance of any proceedings had or threatened by defendants.<sup>3</sup>

§ 1328. An injunction is not an appropriate remedy for enforcing or executing a judgment awarding a peremptory writ of *mandamus* against a public officer. And where a state treasurer has been required by *mandamus* to pay a sum of money to the relator, the latter will not be allowed the aid of an injunction to restrain the treasurer from making any payments until he has paid the sum required by the proceedings in *mandamus*.<sup>4</sup> In England, however, an injunction has been granted against the lords of the treasury to restrain them from performing a merely ministerial

<sup>1</sup> *Martin v. Ingham*, 38 Kan., 641; *Chesapeake & O. R. Co. v. Miller*, 19 West Va., 408. See also *Martin v. Lacý*, 39 Kan., 703. But in *Martin v. Ingham*, 38 Kan., 641, the injunction was denied upon other than jurisdictional grounds.

<sup>2</sup> *Brem v. Houck*, 101 N. C., 627.

<sup>3</sup> *People v. Canal Board*, 55 N. Y., 390, affirming S. C., 1 *Thomp. & C.*, 309.

<sup>4</sup> *Citizens Bank of Louisiana v. Dubuclet*, 26 La. An., 81.

duty, such as the payment of money pending a contest between different claimants of the fund.<sup>1</sup>

§ 1329. Where, under the law of a state, a board of medical examiners is appointed in each county to examine applicants for certificates to practice medicine, a failure upon the part of certain members of such board to notify others of the time and place of organizing the board will not warrant an injunction to restrain its operations, when such notice is not absolutely required by the statute.<sup>2</sup>

<sup>1</sup> *Ellis v. Earl Grey*, 6 Sim., 214.      <sup>2</sup> *Howard v. Parker*, 49 Tex., 236.

## CHAPTER XXIII.

### OF INJUNCTIONS IN PARTNERSHIP MATTERS.

I.	PRINCIPLES GOVERNING THE JURISDICTION . . . . .	§ 1330
II.	DISSOLUTION OF THE FIRM . . . . .	1342
III.	INJUNCTIONS IN CONNECTION WITH RECEIVERS . . . . .	1350

#### I. PRINCIPLES GOVERNING THE JURISDICTION.

§ 1330.	General rule and illustrations.	
1331.	Removal of firm books enjoined.	
1332.	Enforcement of judgment between partners.	
1333.	Withdrawal from firm; violation of articles.	
1334.	Judgment against one partner.	
1335.	Exclusion from business; warrant of attorney to confess judgment.	
1336.	Sale of newspaper business by one partner enjoined.	
1337.	Rights of creditor without judgment.	
1338.	Illustrations of the general doctrine.	
1339.	Further illustrations.	
1340.	Third person not enjoined from disposing of real estate.	
1341.	Remedy provided by articles; non-compliance with articles.	

§ 1330. Courts of equity will entertain jurisdiction to prevent by injunction members of a copartnership from the commission of acts inconsistent with the terms of their agreement, and from violating the rights of their copartners. The jurisdiction is founded upon well established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought.<sup>1</sup> Thus, where

<sup>1</sup>*Cropper v. Coburn*, 2 *Curtis*, 465; *Marble Company v. Ripley*, 10 *Wal.*, 339; *New v. Wright*, 44 *Miss.*, 202; *Miles v. Thomas*, 9 *Sim.*, 606; *Fairthorne v. Weston*, 3 *Hare*, 387. In the latter case it was said by *Wigram*, Vice Chancellor, that, "If that were the rule of the court, if a bill would in no case lie to compel a man to observe the covenants of a partnership deed, unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his copartner to submit to

several partners are engaged in trade, one of their number may be enjoined from using force to the obstruction or interruption of the trade, and from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business.<sup>1</sup> And where one of the members of a firm has been temporarily insane, and on his recovery his copartners exclude him from the management of the firm business, an injunction will be allowed to restrain them from thus excluding him from the business.<sup>2</sup> So where a partnership is formed for a term of years, to be terminated on notice by either party for a given length of time, an injunction will be granted to prevent one partner from obstructing the other in the enjoyment of his partnership rights, and from any improper use of the partnership funds or effects.<sup>3</sup> And the use by one partner of firm property for purposes foreign to the partnership, and in violation of the articles and without the consent of his copartner, affords sufficient ground for an injunction.<sup>4</sup> So the administrator of a deceased partner may enjoin the surviving partner and others who are in possession of the firm assets from disposing of them with intent to appropriate the proceeds to their own use, defendants being alleged to be insolvent.<sup>5</sup> But mere temptation to dishonesty and to the abuse or improper use of partnership property will not of itself induce a court of equity to interfere. And where all the partners save one engaged in the publication of a newspaper are also partners in a rival publication, an injunction will not be granted to restrain one of the papers from using the material of the other

the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract." Lord Eldon, however, was averse to granting an injunction to prevent the breach of a covenant in partnership articles, unless the case was a proper one for a dissolution of the firm and unless the

bill sought a dissolution. See *Marshall v. Colman*, 2 Jac. & W., 266.

<sup>1</sup> *Brewers' Case*, 19 Ves., second English edition, note to page 148.

<sup>2</sup> *Anonymous*, 2 Kay & J., 441.

<sup>3</sup> *Hall v. Hall*, 12 Beav., 414.

<sup>4</sup> *New v. Wright*, 44 Miss., 202.

<sup>5</sup> *Fletcher v. Vandusen*, 52 Iowa, 448.

under a contract under which the parties have long acted.<sup>1</sup> But an injunction is proper in such a case to prevent one of the papers from publishing any information obtained exclusively at the expense of the other, until published in the paper thus obtaining it.<sup>2</sup>

§ 1331. The removal by one partner of partnership books from the counting house of the firm, contrary to an express covenant in the copartnership articles, affords sufficient ground for enjoining such partner from continuing to violate the covenant, and such an injunction may be continued to the final hearing.<sup>3</sup> And upon a bill for a dissolution and an accounting an injunction will be granted to restrain one partner from removing the firm books, or from keeping them at any other place than the place of business of the firm, although the books have already been removed and the injunction, in effect, operates as a mandatory injunction to compel their return.<sup>4</sup>

§ 1332. Upon a bill for an accounting and settlement of all partnership matters between members of a firm, the defendant partner may be enjoined from enforcing a judgment previously recovered in his favor against the plaintiff partner, when the firm matters which are made the foundation of the suit in equity for the accounting could not have been urged in defense of the action in which such judgment was recovered. And in such a case the failure or omission to enjoin the prosecution of the action at law in which the judgment was recovered will not prevent an injunction against the enforcement of the judgment.<sup>5</sup>

§ 1333. When a partnership is formed for a given period, a member of the firm may be enjoined from withdrawing and entering upon a new partnership before the expiration of that period, and the new partners may also be enjoined

<sup>1</sup> *Glassington v. Thwaites*, 1 Sim. & St., 124.

<sup>2</sup> *Id.*

<sup>3</sup> *Taylor v. Davis*, 3 Beav., 388, note.

<sup>4</sup> *Greatrex v. Greatrex*, 1 DeG. & Sm., 692.

<sup>5</sup> *Gregg v. Brower*, 67 Ill., 525.

from carrying on business with such partner, or otherwise, in the name of the original firm, and from receiving letters addressed to such firm.<sup>1</sup> And where, in violation of his partnership articles, one of the proprietors of a theater engages in writing plays for another theater, an injunction may properly be allowed.<sup>2</sup>

§ 1334. Where, under a judgment at law against one member of a copartnership for his individual debt, his interest in the firm property has been levied upon, a court of equity will not enjoin the proceedings until the partnership accounts have been liquidated. Such a proceeding would inevitably cause great delay and embarrassment to the individual creditors, and equity will not lend its aid to thus impede a creditor in the enforcement of his just demand.<sup>3</sup> So equity will not enjoin a judicial sale of partnership property upon the application of firm creditors whose rights will not be affected by such sale, but the court will presume in such case that the sheriff intends to sell in accordance with

<sup>1</sup> *England v. Carling*, 8 Beav., 129.

<sup>2</sup> *Morris v. Colman*, 18 Ves., 437.

<sup>3</sup> *Moody v. Payne*, 2 Johns. Ch., 548; *Wickham v. Davis*, 24 Minn., 167. The rule as laid down in the text is sustained by no less an authority than Chancellor Kent, who observes in *Moody v. Payne*: "I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liquidation of the concerns of the copartnership. This would produce inconceivable delay and embarrass-

ment in respect to separate creditors." But see *Place v. Sweetzer*, 16 Ohio, 142, and *Sutcliffe v. Dohrman*, 18 Ohio, 181, where it is held that when an execution has been levied upon partnership property to satisfy the individual debt of a member of the firm, the sale of the property may be restrained until the interest of the partner is ascertained. And in *Williams v. Lewis*, 115 Ind., 45, it is held that the seizure and taking away of a portion of the partnership property under execution against one member of the firm may be enjoined. But an injunction has been refused which was sought to restrain the sale of a locomotive owned by three railway companies in partnership under a judgment against one of the companies. *Lamoille Valley R. Co. v. Bixby*, 55 Vt., 235.



law, and will not grant an injunction for the purpose of compelling him to do his duty.<sup>1</sup> And a creditor of the firm, who has not yet reduced his claim to judgment, has no such *quasi* lien upon the partnership property as to entitle him to the aid of equity to restrain a judgment creditor of an individual member of the firm from satisfying his judgment out of the firm property. The rule is deducible from the general principle that a creditor at large, or before judgment, is not entitled to the interference of a court of equity to prevent his debtor from disposing of his property, but must first reduce his claim to judgment.<sup>2</sup>

§ 1335. The exclusion of one partner from the premises where the firm business is being conducted, and preventing him from participation in the business, constitute sufficient cause to warrant a court of equity in restraining the remaining partner from receiving and collecting debts due the firm.<sup>3</sup> So the refusal by partners to permit an examination by their copartner of the books of account, and their giving of the firm notes in settlement of debts not owing by the firm, and their refusal to apply the firm funds in payment of its debts constitute sufficient ground for an injunction and for the appointment of a receiver.<sup>4</sup> But where one member of a firm has been enjoined from intermeddling with the partnership assets and effects, he is not guilty of a breach of the injunction in giving authority to an attorney to confess judgment for a debt due to a creditor of the firm, for the purpose of enabling such creditor to obtain a priority over other creditors by levying on the partnership assets.<sup>5</sup>

§ 1336. In granting or withholding relief by injunction in cases arising between partners, the courts will look to the nature of the business in which the firm is engaged, and regard will be had to the scope of the authority of the partners as confined to that particular business. And where

<sup>1</sup> Saunders v. Irwin, 17 Hun, 342.

<sup>3</sup> Wolbert v. Harris, 3 Halst. Ch.,

<sup>2</sup> Young v. Frier, 1 Stockt., 465; 605.

Mittnacht v. Smith, 2 C. E. Green, 259.

<sup>4</sup> Shannon v. Wright, 60 Md., 520.

<sup>5</sup> McCredie v. Senior, 4 Paige, 378.

the object of a firm is not the buying and selling of goods, but the conducting of a newspaper, to which the continued ownership of the partnership property is indispensable, an attempt by one partner to sell the entire property of the firm will be enjoined, such an act not being properly within the scope of the partner's authority.<sup>1</sup>

§ 1337. While, as we have already seen, a creditor at large whose claim has not been established by judgment will not be allowed to interfere with the disposition either of his debtor's partnership or individual property, the rule may be varied by statute. And under a statute authorizing a creditor to vacate any conveyance or contract made by the debtor which is fraudulent as against creditors, without first reducing his claim to judgment, the creditor may rightfully enjoin a fraudulent assignment of the effects of a copartnership.<sup>2</sup> But an injunction in such case, while it will embrace all the partnership property included in the fraudulent assignment or transfer, will not affect the separate property held *bona fide* by individual members of the firm, and not claimed by them under any fraudulent transfer of property originally owned by the copartnership.<sup>3</sup>

§ 1338. A member of a partnership who holds notes for the benefit of the firm, and attempts to pledge or pawn them for his own private debts, is guilty of such fraudulent misappropriation as will be restrained by a court of equity.<sup>4</sup> So, too, if one partner attempts to dispose of specific chattels belonging to the firm, pending litigation for the adjustment of the partnership affairs, he may be enjoined.<sup>5</sup> And if one partner brings an action at law

<sup>1</sup> *Sloan v. Moore*, 37 Pa. St., 217.

<sup>2</sup> *Sanderson v. Stockdale*, 11 Md., 563.

<sup>3</sup> *Id.*

<sup>4</sup> *Stockdale v. Ullery*, 37 Pa. St., 486. And this was held under a statute authorizing injunctions to restrain acts "contrary to law," the court holding that acts contrary to

equity were within the purview of the statute and should be enjoined accordingly.

<sup>5</sup> *Ellis v. Commander*, 1 Strob. Eq., 188. As to the effect of an injunction obtained by one partner to restrain his copartner from selling the firm property, upon an action of replevin brought by a pur-

against another, where, having regard to the state of the partnership business and accounts, such action should not be brought, an injunction may be granted.<sup>1</sup> So where one partner sells to the other his entire interest in the partnership property, with an implied warranty of title, a subsequent levy upon and sale of the property by creditors of the firm is such a failure of consideration as will warrant a court of equity in entertaining a bill, in behalf of the sureties of the purchaser, to enjoin proceedings at law for the purchase money.<sup>2</sup>

§ 1339. An injunction has been allowed to restrain one person from representing another to be his partner and holding him out to the world as such, without his consent or authority.<sup>3</sup> But equity will not interfere to prevent a partner from acting in that capacity, merely because public confidence in the firm might be shaken if it were known that such person was a partner.<sup>4</sup> And where an injunction has been allowed to restrain one partner from interfering with another's rights as a member of the firm, it will be dissolved on the coming in of the answer showing that the partnership has been dissolved by mutual consent.<sup>5</sup>

§ 1340. In a suit between partners for a settlement of their firm affairs, a court of equity will not enjoin a third person, who is not shown to be in any manner connected with the partnership, from using or disposing of real estate the title to which is in him, upon an allegation that it has been fraudulently transferred to such third person by one of the partners.<sup>6</sup>

§ 1341. Equity may properly refuse to interfere by injunction in partnership affairs, when the articles of co-

chaser of the property in question after service of the injunction, see *Shelton v. Franklin*, 68 Ill., 333.

<sup>1</sup> *Gould v. Canham*, 1 Ch. Cas., 311.

<sup>2</sup> *Hough v. Chaffin*, 4 Sneed (Tenn.), 238.

<sup>3</sup> *Routh v. Webster*, 10 Beav., 561.

<sup>4</sup> *Anonymous*, 2 Kay & J., 441.

<sup>5</sup> *Van Kuren v. Trenton Company*, 2 Beas., 302.

<sup>6</sup> *McKee v. Griffin*, 23 La. An., 417.

partnership provide a remedy for the adjustment of firm difficulties, until the parties have availed themselves of such remedy.<sup>1</sup> And when one member of a firm seeks to restrain his copartner from a violation of or departure from the terms of the partnership articles, the relief may properly be withheld when plaintiff himself has not complied with such articles.<sup>2</sup>

<sup>1</sup> *Carlen v. Drury*, 1 Ves. & B.,  
154.

<sup>2</sup> *Smith v. Fromont*, 2 Swanst.,  
330.

## II. DISSOLUTION OF THE FIRM.

- § 1342. Injunction pending action for dissolution.
- 1343. Agreements not to continue firm business.
- 1344. Urgent necessity must be shown; illustrations.
- 1345. Firm name and good-will after dissolution.
- 1346. Publication of periodical.
- 1347. Vessel not enjoined from sailing.
- 1348. Violation of agreement for dissolution.
- 1349. Publication of letters after dissolution.

§ 1342. In an action for a dissolution of a partnership the court may, upon proper showing, restrain any member of the firm from improper interference with the business, or from committing any damage to the property of the firm.<sup>1</sup> Thus, one member may be enjoined from collecting any debts due the copartnership, or from accepting or negotiating bills of exchange for other than partnership purposes.<sup>2</sup> And the court may even restrain one partner from using the firm name in any manner in drawing or indorsing commercial paper, or in accepting bills of exchange.<sup>3</sup> And where, upon a dissolution, one of the partners takes all of the property and assets, agreeing to pay all of the debts, and to hold the other partner harmless on account thereof, but afterward becomes insolvent and threatens to dispose of the property for his own benefit, leaving the debts unpaid, he may be enjoined at the suit of the creditors from doing the acts threatened.<sup>4</sup>

§ 1343. Agreements by one or more of the retiring members, on the dissolution of a firm, not to carry on the firm business, may be enforced in equity by enjoining any attempt at their violation. Such agreements are not to be construed as in restraint of trade generally, nor are they in contravention of public policy, and, there being no ade-

<sup>1</sup> *Crockford v. Alexander*, 15 Ves., 138; *Smith v. Jeyes*, 4 Beav., 503; *Marshall v. Watson*, 25 Beav., 501.

<sup>2</sup> *Jervis v. White*, 7 Ves., 413; *Hood v. Aston*, 1 Russ., 412.

<sup>3</sup> *Read v. Bowers*, 4 Bro. C. C.,

<sup>4</sup> *Deveau v. Fowler*, 2 Paige, 400.

quate remedy at law for their violation, a court of equity is the proper tribunal to afford relief.<sup>1</sup> Thus, where one of several partners engaged in the carrying trade purchases the interest of all the others in the assets and good-will of the business, they agreeing in writing not to do anything which will impair or injure the good-will of the trade, equity will enjoin them from taking any steps tending to draw away the business to themselves. In such a case, the injury being a constantly recurring one, the damages sustained are not susceptible of accurate computation, and an action at law would afford no adequate redress for the loss sustained.<sup>2</sup>

§ 1344. While the objections to the interference of equity by injunction in partnership cases are less strong after dissolution than before, yet even then some urgent and pressing necessity must be shown to induce the court to sustain an injunction. And where the partner against whom the injunction is sought has the legal right to the partnership property, in accordance with the terms of the contract of dissolution, an injunction will not be sustained to restrain him from the management of the property, the bill containing no allegations of his insolvency.<sup>3</sup> So the fact that a partnership may be unprofitable, and should therefore be dissolved or discontinued, will not warrant a court in enjoining one of the partners from proceeding with the business and settling up the firm affairs.<sup>4</sup> And to justify an injunction as to funds in the hands of a defendant partner, in an action for the settlement of partnership affairs, it should appear that there is danger that the money will ultimately be lost to the plaintiff. And when it is not shown that defendant is insolvent, or that there is any danger of

<sup>1</sup> *Angier v. Webber*, 14 Allen, 9; *Heflebower v. Buck*, 64 Md., 15, 211; *Whittaker v. Howe*, 3 Beav., 383. And see *Drury v. Roberts*, *ib.*, 157.

<sup>2</sup> *Angier v. Webber*, 14 Allen, 207. See also *Woodward v. Schatzell*, 3 John. Ch., 412.

<sup>3</sup> *O'Bryan v. Gibbons*, 2 Md. Ch.,

ultimate loss to the plaintiff, the injunction should not be allowed.<sup>1</sup>

§ 1345. The right to use the firm name may be regarded as one of the partnership assets, and if upon a dissolution one member of the firm purchases the entire business, the name is regarded as passing with the other assets, and the retiring partner may be restrained from its use.<sup>2</sup> And a surviving partner, having the right to use the firm name of the partnership, may, if he has not abandoned the right, restrain the executor of the deceased partner from using the name for his own benefit.<sup>3</sup> Indeed, the good-will and firm name of a partnership constitute so important a part of the firm assets as to be entitled to the protection of equity by injunction. And the appropriation by one partner of a firm name so closely imitating that of the original as to mislead purchasers and divert trade from the original firm may be enjoined. And the defendant may, in such case, be enjoined from the use of his own name in such manner as to mislead the public and injure the good-will of the firm; and this may be done, notwithstanding the bankruptcy of the firm and the appointment of a receiver, since it is necessary to preserve the good-will and name as part of the firm assets.<sup>4</sup> So upon a sale of the good-will of a partnership business in conducting an insane hospital, the court may, for the purpose of giving efficacy to such sale, allow either of the partners to purchase, and may enjoin all save the purchaser from conducting the same business in that locality.<sup>5</sup> So when upon the dissolution of a partnership the retiring partner sells to the other all the firm property, but without mention of the good-will, neither the continuing partner nor his assignee will be permitted to so use the old firm name as to give third persons reason to believe that the retiring partner is still connected with the business, when this would

<sup>1</sup> Wellman v. Harker, 3 Oregon, 253.

<sup>2</sup> Banks v. Gibson, 34 Beav., 566.

<sup>3</sup> Lewis v. Langdon, 7 Sim., 422.

<sup>4</sup> Bininger v. Clark, 60 Barb. 113; S. C., 10 Ab. Pr. N. S., 264.

<sup>5</sup> Williams v. Wilson, 4 Sandf. Ch., 380.

be injurious to him in his own business; and the retiring partner, in such case, is entitled to be protected by injunction.<sup>1</sup> But a partner who has been expelled from the firm for violating the partnership articles, and who has been repaid his share of the capital, will not be enjoined from resuming business upon his own account and from soliciting the customers of the old firm, in the absence of any contract binding him not to resume.<sup>2</sup>

§ 1346. It is also held, upon principles analogous to those above stated, that when a firm of partners are owners and proprietors of a periodical, the retiring partner has no right, upon a dissolution of the firm, to announce by advertisement that the periodical will be discontinued, although he may announce that it will be discontinued as regards himself. And in such a case, the retiring partner undertaking to limit his advertisement or announcement so that it shall only announce the discontinuance of the publication as regards himself, the court may decline to make any order respecting the injunction.<sup>3</sup>

§ 1347. Upon a bill by the owner of a fractional interest in a ship, praying an account and a dissolution of the partnership, a court of equity will not by injunction prevent the vessel from sailing when the object of the suit is, in effect, to compel defendant to give security to abide the decree in the cause, but will leave the party aggrieved to pursue his remedy in admiralty.<sup>4</sup>

§ 1348. When two partners enter into an agreement that the firm shall be dissolved and that the partnership estate, stock and good-will, shall be conveyed to receivers, who are to act in the winding up of the firm, an injunction may be allowed to prevent one of such partners from using the firm property and effects for his own exclusive benefit.<sup>5</sup>

<sup>1</sup> McGowan Co. v. McGowan, 22 Ohio St., 370.

<sup>2</sup> Dawson v. Beeson, 22 Ch. D., 504. See also Pearson v. Pearson, 27 Ch. D., 145.

<sup>3</sup> Bradbury v. Dickens, 27 Beav., 53.

<sup>4</sup> Hallaran v. Donal, 9 Ir. Eq., 217.

<sup>5</sup> Turner v. Major, 3 Gif., 442.



§ 1349. One member of a copartnership may be enjoined, after a dissolution of the firm, from publishing letters received from his copartner, which were written and received in the course of their partnership business, and pertained to that business, where the purposes of justice do not require the publication. The interference of the court in such case is based upon the principle that the writer of a letter does not transfer the absolute property in or ownership of the letter to the person receiving it, who is only authorized to use it for the purpose for which it was sent, the ownership of the letter still remaining in the writer.<sup>1</sup>

<sup>1</sup> *Roberts v. McKee*, 29 Ga., 161. And see *Gee v. Pritchard*, 2 Swanst., 403.

## III. INJUNCTIONS IN CONNECTION WITH RECEIVERS.

- § 1350. The general doctrine stated.  
1351. Serious disagreement between partners.  
1352. Limitations upon the general doctrine.  
1353. Insolvency of defendant; want of confidence.  
1354. How far injunction dependent upon receivership.  
1355. Illustrations of the relief.  
1356. Administrator of deceased partner allowed relief.  
1357. Partnership in farm; sawing lumber.  
1358. Misconduct of defendant.  
1359. Receiver not enjoined from managing property.

§ 1350. The extraordinary remedy of equity by injunction in partnership matters is frequently invoked in connection with the appointment of receivers, although the two remedies are not necessarily or always invoked or granted at the same time. In general it may be said that when upon the dissolution of a partnership the members of the firm are unable to agree upon the manner of closing up its affairs, it is the usual practice of courts of equity, with a view to protect the rights of all parties in interest, to exclude all the partners from participating in the business of closing up the firm, and to appoint a receiver for that purpose; and in that event an injunction is proper to prevent a partner from participating in the winding up of the firm.<sup>1</sup> But to warrant a receiver and an injunction in partnership cases such a state of facts must be shown by the plaintiff as, if proved at the hearing, will entitle him to a decree for a dissolution of the firm. And in determining whether the conduct of one partner has been such as to entitle the other to a dissolution, in passing upon an application for an injunction and a receiver, the court will consider not merely the specific terms of the contract of partnership, but also the duties and obligations which are implied in every such undertaking. And if it is manifest that the conduct of the defendant partner has been so injurious to the firm and

<sup>1</sup> *Van Rensselaer v. Emery*, 9 How. Pr., 185.

so inconsistent with his duties as a partner as to entitle plaintiff to a dissolution, a receiver and an injunction will be allowed.<sup>1</sup> But, although an interlocutory injunction has been granted, *ex parte*, upon a bill by one partner seeking a dissolution, it does not necessarily follow that a receiver will be appointed over the affairs of the firm. And if the court is satisfied that such a case is not presented as to entitle plaintiff to a final dissolution it will refuse to appoint a receiver, notwithstanding such injunction, leaving the injunction to be dissolved in due time and upon proper motion.<sup>2</sup>

§ 1351. The fact that the conduct of the defendant partner has been such as to destroy the mutual confidence which ought to subsist between partners is an important element influencing the court in granting relief by an injunction and a receiver in partnership cases.<sup>3</sup> And when the pleadings disclose a serious and apparently irreconcilable disagreement between the partners as to the control and disposition of their property and effects, and as to their respective demands against each other, the appointment of a receiver and allowing an injunction are regarded as a provident exercise of the powers of a court of equity, sanctioned alike by authority and by the exigencies of the case.<sup>4</sup> So when it is apparent that the defendant partner has deliberately resolved to break up and ruin the firm business, and the personal relations of the partners are such that they can not carry on business with advantage to each other, sufficient cause is presented for an injunction and a receiver.<sup>5</sup>

§ 1352. The appointment of receivers in partnership cases depends largely upon the special circumstances of each particular case, and it is difficult to lay down any rules of

<sup>1</sup> Smith v. Jeyes, 4 Beav., 503.

30. See also Shannon v. Wright,

<sup>2</sup> Garretson v. Weaver, 3 Edw.

60 Md., 520.

Ch., 385.

<sup>5</sup> Sutro v. Wagner, 8 C. E. Green,

<sup>3</sup> Smith v. Jeyes, 4 Beav., 503.

388.

<sup>4</sup> Whitman v. Robinson, 21 Md.,

general application. It does not necessarily follow that because a partnership has been dissolved and because a partner is entitled to an accounting, that he is therefore entitled to an injunction and a receiver; but there must be some actual abuse of the rights of a copartner, or of the partnership property, before a court of equity will interfere. And in the case of a dissolution by the sale of the interest of one partner under an execution against him individually, the court will be governed by the same rule, in interfering with the other partner, as in case of a dissolution by death; and the injunction will not be allowed if the equities do not clearly warrant it.<sup>1</sup>

§ 1353. Upon a bill between partners for a settlement of the affairs of the partnership, after a dissolution, the insolvency of the defendant will warrant the court in granting an injunction and appointing a receiver for the protection of complainant. The insecurity of the partnership assets in such a case, if left in the control of an insolvent member of the dissolved firm, affords strong ground for equitable relief.<sup>2</sup> And where, through the improper conduct of one of two partners, such a want of confidence exists between them as is sufficient to warrant the court in dissolving the partnership, a receiver may be appointed and an injunction allowed, the injunction in such case following the receiver almost as a matter of course.<sup>3</sup>

§ 1354. The continuance of an injunction granted to preserve partnership property from waste, pending an application for the appointment of a receiver, must depend upon the fate of such application, and if the receiver is denied the injunction must be dissolved.<sup>4</sup> But the injunction being regarded as auxiliary to the appointment of a receiver, upon the removal of the receiver and the appoint-

<sup>1</sup> *Renton v. Chaplin*, 1 Stockt., 62. See also *Heflebower v. Buck*, 64 Md., 15.

<sup>2</sup> *Randall v. Morrell*, 2 C. E. Green, 343.

<sup>3</sup> *Seighortner v. Weissenborn*, 5 C. E. Green, 172.

<sup>4</sup> *Walker v. House*, 4 Md. Ch., 39.

ment of another, the injunction originally allowed will be continued as of course.<sup>1</sup>

§ 1355. The fact that one partner has failed to contribute his share to the capital stock of the firm, as agreed by the copartnership articles, and that he sells his interest in the firm to a third person without the knowledge and consent of the other partner, and refuses to pay any portion of the firm indebtedness, coupled with his insolvency and the fact that the purchaser has taken possession of the firm assets and excludes the other partner therefrom, will warrant the granting of an injunction and the appointment of a receiver to take charge of the firm assets.<sup>2</sup> And where a partnership is formed merely at will, to be dissolved at the pleasure of either party, and it does in fact become dissolved by the insolvency of some of its members, an attempt by the insolvent partners to appropriate the firm assets to the payment of their private debts by an assignment thereof for the benefit of their creditors affords sufficient ground to entitle the remaining partners to an injunction and a receiver. And in such case, the receivership and the injunction should extend to and cover all the firm assets in the hands of the defendant partners and the assignee, in order to prevent their misappropriation.<sup>3</sup>

§ 1356. In the case of a partnership dissolvable at will, there being no partnership articles and no provision for a continuation of the business by the administrators or representatives of a deceased partner, upon the death of one member of the firm if the surviving partner refuses to proceed within a reasonable time to close up the affairs of the firm, continuing the business meanwhile in his own name and for his own benefit, upon a bill by the administrator of the deceased partner a court of equity will enjoin such con-

<sup>1</sup> *Williamson v. Wilson*, 1 Bland, 418.

<sup>3</sup> *Davis v. Grove*, 2 Rob. (N. Y.), 134; *Same v. Same*, *Ib.*, 635.

<sup>2</sup> *Heathcot v. Ravenscroft*, 2 Halst. Ch., 113.

tinuation of the business and appoint a receiver over the firm affairs.<sup>1</sup>

§ 1357. Where plaintiffs, the owners of a farm, enter into an agreement in the nature of a partnership with defendant to work the farm and divide the profits, with a provision that plaintiffs may terminate the partnership on six months notice if the profits do not reach a given amount, upon showing that the farm has not paid the amount agreed upon, plaintiffs are entitled to an injunction and a receiver to wind up the affairs of the partnership.<sup>2</sup> So when a partnership is formed for the purpose of sawing lumber, and by the articles of agreement the partner having charge of the business is to take the timber used at the mill from land belonging to his copartner, a violation of this agreement constitutes such a breach of duty as to justify an injunction and a receiver, when the business is shown to be in a losing condition and the indebtedness of the firm increasing.<sup>3</sup>

§ 1358. In an action for the settlement of partnership accounts, although there may be some dispute as to whether property in possession of a defendant partner is really firm property, yet when it sufficiently appears that it was received in part payment for a sale of partnership property, and plaintiff shows that defendant is insolvent and has acted in bad faith, and that he has disposed of part of the property with intent to defraud the firm creditors, sufficient cause is shown for an injunction and a receiver, leaving defendant to show, if he can, in the further stages of the cause, that the property in question is his individual property.<sup>4</sup>

§ 1359. When the appointment of a receiver over a partnership, upon proceedings under judgments against the firm, has become perfected by his giving the required security, such receiver becomes at once entitled to possession of

<sup>1</sup> Holden's Adm'rs v. McMakin,

1 Par. Eq. Cas., 270.

<sup>2</sup> Dunn v. McNaught, 38 Ga., 179.

<sup>3</sup> New v. Wright, 44 Miss., 202.

<sup>4</sup> Saylor v. Mockbie, 9 Iowa, 209.

the partnership effects; and the assets thus in his possession are deemed to be in the custody of the court, and will not be disposed of without a hearing of all parties in interest. It is improper, therefore, to enjoin such receiver from the management of the property or fund, since this would in effect restrain the court itself from disposing of the funds which might come into the hands of its officers.<sup>1</sup>

<sup>1</sup> *Van Rensselaer v. Emery*, 9 How. Pr., 135.

## CHAPTER XXIV.

### OF INJUNCTIONS PERTAINING TO EXECUTORS AND ADMINISTRATORS.

- § 1360. Jurisdiction exercised for protection of estate; when sales enjoined.
- 1361. Improper distribution; suit enjoined; insolvency.
  - 1362. Defective execution of power.
  - 1363. Judgment against administrator, when enjoined.
  - 1364. Illustrations of the jurisdiction.
  - 1365. Execution against administrator, when enjoined.
  - 1366. Fraud by administrator or executor.
  - 1367. Relief in behalf of heirs at law.
  - 1368. The jurisdiction not favored.
  - 1369. Injunctions against judgments.
  - 1370. Judgment against legatee, when enjoined.
  - 1371. Second administrator's sale enjoined.
  - 1372. Injunction denied when other relief available.
  - 1373. Injunction refused against executor's sale.
  - 1374. Sale of legacies under execution enjoined.

§ 1360. The granting of injunctions for or against executors and administrators is based upon principles of a purely equitable nature, and the jurisdiction is generally exercised for the protection of the estate to be administered, although it may, as we shall hereafter see, be allowed for the protection of the executor or administrator personally. It may be said, generally, that proceedings by an administrator without due and sufficient authority may be enjoined at the suit of the next of kin. Thus, where an administrator is proceeding without proper authority to sell the effects of his intestate, an injunction is the proper remedy.<sup>1</sup> And when an executor, having a power of sale under the will, is proceeding to sell real estate for the payment of demands against the estate which are barred by the statute of limita-

<sup>1</sup> *Lawrence v. Philpot*, 27 Ga., 585.



tions, plaintiffs who have succeeded to the testator's title may enjoin such sale upon the ground of preventing a cloud upon their title.<sup>1</sup> And an administrator's sale of real property for the payment of debts has been enjoined when there had been a delay of many years in procuring an order to sell after the granting of administration.<sup>2</sup> So a widow has been allowed to enjoin executors of the estate from selling property to which the widow was entitled as her award, under the laws of the state.<sup>3</sup> But an executor will not be restrained from selling at the suit of creditors in the absence of any allegation of waste or mismanagement.<sup>4</sup>

§ 1361. Where executors refuse to distribute the estate ratably among the creditors, according to the terms of the devise, and threaten to secure certain favored creditors who are entitled to no preference, either at law or in equity, an injunction may be allowed to prevent them from making such a disposition of the estate.<sup>5</sup> And where a non-resident and insolvent executor is seeking by suit in the common law courts to obtain possession of a fund belonging to the estate, he may be enjoined from proceeding with his suit upon a strong showing of danger of his wasting or misapplying the fund.<sup>6</sup> But it is to be observed that insolvency of the executors is not of itself sufficient cause to warrant a court of equity in restraining them from a sale of the property, and thereby taking the administration of the estate out of their hands.<sup>7</sup>

§ 1362. The defective execution of the powers conferred upon administrators constitutes ground for relief in equity in favor of *bona fide* purchasers for valuable consideration. Thus, the heirs of a deceased person may be enjoined from prosecuting an action of ejectment for the recovery of real

<sup>1</sup> Butler v. Johnson, 111 N. Y., 204.

<sup>2</sup> Gunby v. Brown, 86 Mo., 253.

<sup>3</sup> Denny v. Denny, 113 Ind., 22.

<sup>4</sup> Elam v. Elam, 72 Ga., 162.

<sup>5</sup> Depau v. Moses, 3 Johns. Ch., 349.

<sup>6</sup> Dougherty v. Walker, 15 Ga., 442.

<sup>7</sup> Schanck v. Executors of Schanck, 3 Halst. Ch., 140.

estate sold by the administrators of the estate, the only foundation for the action being the omission of one of the two administrators to join in the conveyance. The sale having been consummated and the purchase money paid in good faith, the purchaser is entitled to the aid of equity to relieve against the defective conveyance.<sup>1</sup>

§ 1363. An injunction has been allowed in behalf of an administrator to restrain the enforcement of a judgment against him, where, subsequent to the rendering of the judgment, he has discovered set-offs and credits to which his intestate was entitled, but of which the administrator was ignorant when the judgment was obtained.<sup>2</sup> And where, on the application of an administrator, an injunction has been allowed to restrain a judgment recovered against him in his capacity of administrator, it may be continued until such time as sufficient assets shall come into his hands to satisfy the judgment, or any part thereof, reserving to the judgment creditor the right to show such assets by *sci. fa.*<sup>3</sup>

§ 1364. An executor who has rendered himself personally liable at law will not be protected in equity against a judgment at law for such liability.<sup>4</sup> Courts of equity will not, however, permit their own decrees to be interfered with, and to prevent this they will, under proper circumstances, exercise their undoubted jurisdiction by injunction for their own protection.<sup>5</sup> Thus, a decree requiring an administrator to render an account will be protected by injunction; and such a decree being for the benefit of all the creditors, and in the nature of a judgment for them all, the relief will be allowed on the application of either party to restrain proceedings at law by any of the creditors against the administrator, instituted after the date of the decree.<sup>6</sup>

<sup>1</sup> Wortman v. Skinner, 1 Beas., 358.

<sup>2</sup> Terril's Adm'rs v. Southall's Ex'r, 3 Bibb, 458.

<sup>3</sup> Haydon v. Goode, 4 Hen. & Munf., 460.

<sup>4</sup> Burles v. Popplewell, 10 Sim., 383.

<sup>5</sup> Brooks v. Dent, 4 Md. Ch., 473; Burles v. Popplewell, 10 Sim., 383.

<sup>6</sup> Brooks v. Dent, 4 Md. Ch., 473. And see Thompson v. Brown, 4 Johns. Ch., 619.

§ 1365. Equity exercises control over matters affecting the administration of estates by virtue of its original jurisdiction, notwithstanding such matters have been committed by statute to other tribunals, unless its jurisdiction has been expressly withdrawn. It is, therefore, proper for a court of equity to enjoin the enforcement of an execution *de bonis propriis* against an administrator, after the estate of the decedent has become insolvent and has been so declared by the proper probate court.<sup>1</sup> And it constitutes no defense to a bill filed for such purpose that the insolvency of the estate was caused by the neglect of the administrator to collect assets, such a question being properly referable to the probate court, which is the appropriate tribunal for determining questions relating to the misconduct of the administrator.<sup>2</sup>

§ 1366. Fraudulent and collusive conduct upon the part of an administrator, to the injury of the estate which he represents, may justify the interference of equity by an injunction restraining his fraudulent proceedings.<sup>3</sup> Thus, where an administrator, colluding with other persons, has entered into a conspiracy to procure a sale of the property pertaining to the estate for their joint benefit, the administrator having allowed fraudulent claims against the estate, to satisfy which he procures an order for the sale of real estate, he may be enjoined from proceeding with the sale at the suit of persons claiming the ownership of such real estate; although, in such case, the court will only enjoin the sale, without attempting to annul or set aside the order of the probate court.<sup>4</sup> So when an administrator is sued in a court having no jurisdiction over him, but he accepts service and permits judgment to go against him by default, upon an old account against the deceased, which has been

<sup>1</sup> Lambert v. Mallett, 50 Ala., 73;      <sup>3</sup> Larue v. Friedman, 49 Cal.,  
Balkum v. Harper's Adm'r, 50 Ala., 278; Washington v. Barnes, 41  
429.      Ga., 307.

<sup>2</sup> Balkum v. Harper's Adm'r, 50      <sup>4</sup> Larue v. Friedman, 49 Cal.,  
Ala., 429.      278.

barred by the statute of limitations, sufficient ground is shown for relief in equity by a bill to enjoin the judgment at the suit of sureties upon the administrator's bond, they having sufficient interest in the matter to warrant them in proceeding in equity to have the judgment set aside.<sup>1</sup> So a creditor of an estate who has duly proven his claim, which has been allowed by the proper court of probate, is entitled to an injunction to restrain the executor, who is also a mortgagee under a chattel mortgage executed to him by the testator to defraud his creditors, from selling under the mortgage, when the estate itself is insolvent and the executor is also insolvent.<sup>2</sup>

§ 1367. Relief by injunction may also be granted in behalf of the heirs at law against improper conduct on the part of an administrator. For example, where the heirs have paid all the debts of the deceased except a trifling amount due to a single creditor, and have then partitioned the realty between them, they may restrain a sale by an administrator who, without being requested by the creditor or by the heirs, has obtained administration for the avowed purpose of procuring the land himself.<sup>3</sup> So the grantees of real estate, claiming under a conveyance from the heir at law, are entitled to an injunction to prevent the administrator from making a sale of the real estate in satisfaction of claims against the estate, when the personal property is sufficient for their payment.<sup>4</sup> So the heirs may have an injunction until a final hearing to restrain the administrator from selling realty under a power contained in an instrument purporting to be the will of the deceased, but the validity of which is questioned.<sup>5</sup> And upon a bill by heirs at law against an executor, alleging that defendant's testator had held in trust for plaintiffs certain money, which he

<sup>1</sup> *Washington v. Barnes*, 41 Ga., 307.

<sup>2</sup> *Becker v. Anderson*, 6 Neb., 499.

<sup>3</sup> *Owens, Adm'r, v. Childs*, 58 Ala., 113.

<sup>4</sup> *Hill v. Mitchell*, 40 Mich., 389.

<sup>5</sup> *Galbreath v. Everett*, 84 N. C., 546.

had invested in real estate for their benefit, but taking the title in his own name, the bill seeking a conveyance of the premises to plaintiffs, it was held proper to enjoin the executors, until the hearing, from selling the real estate as assets to pay debts of the testator.<sup>1</sup> So where an executor claims under the will and also by gift *inter vivos* from the testator, an injunction may be allowed to restrain him from selling personal property thus claimed, upon a bill charging undue influence by the executor over his testator.<sup>2</sup>

§ 1368. It is not, however, to be inferred that the granting of relief by injunction against an executor is a favorite branch of the jurisdiction of equity by injunction. Indeed, a court of equity is ordinarily averse to granting an injunction in the first instance against an executor, since its effect is to wholly suspend his powers and to prevent him from further acting in the management of the trust.<sup>3</sup> And it would seem that mere irregularities in the appointment of an administrator afford no ground for enjoining him from a sale of property in satisfaction of debts.<sup>4</sup> And while equity frequently interferes for the protection of assets pending litigation in the proper court as to the right to administer, yet when such court has duly appointed administrators and they are legally and equitably entitled to the assets, equity will not enjoin them from dealing therewith upon the application of the next of kin.<sup>5</sup>

§ 1369. An executor will not ordinarily be allowed to enjoin a sale of real estate of the testator in satisfaction of a judgment obtained against him in his life-time.<sup>6</sup> Nor can an administrator enjoin the levy of an execution under a

<sup>1</sup> McCorkle v. Brem, 76 N. C., 407.

<sup>2</sup> Edmunds v. Bird, 1 Ves. & B., 542.

<sup>3</sup> Boyd v. Murray, 3 Johns. Ch., 48.

<sup>4</sup> Ducote v. Bordelon, 24 La. An., 145.

<sup>5</sup> Maher v. Gorman, 6 Ir. Eq., 304. As to the right to enjoin an

executor from receiving assets, pending a contest in the ecclesiastical court for the purpose of recalling probate of the will, see Watkins v. Brent, 1 Myl. & Cr., 97, affirming S. C., 7 Sim., 512; Connor v. Connor, 15 Sim., 598.

<sup>6</sup> Redd v. Blandford, 54 Ga., 123.

judgment against his intestate upon real estate of the intestate, when it is not shown that the administrator will be injured in his representative capacity by the sale of such real estate, or that it will be necessary to sell it for the payment of debts.<sup>1</sup> And an executor who seeks to enjoin the enforcement of a judgment against himself upon the ground of an understanding with the creditor to look to the testator's assets, and not to the executor personally, can not have such injunction upon motion in the administration suit, but must institute a new suit for that purpose.<sup>2</sup> Where, however, the consideration of a note has failed by the payee's own act in breach of his contract, equity may properly enjoin proceedings by the administrator of the payee for the enforcement of the note.<sup>3</sup>

§ 1370. If the executors of an estate are proceeding to collect a judgment against one who is a legatee of the testator to an amount larger than the judgment, it is proper to enjoin them from proceeding when they are insolvent and unable to respond to the legatee for the amount of his demand.<sup>4</sup>

§ 1371. Where an administrator in chief sells land belonging to the deceased pursuant to an order of the probate court, and the purchase money is paid and applied as assets of the estate, and an administrator *de bonis non* subsequently attempts to sell the same lands, such attempted sale operates as such a fraud upon the purchaser under the former sale as to entitle him to the aid of an injunction against the threatened sale.<sup>5</sup>

§ 1372. A court of equity will not, however, enjoin an administrator from proceeding to sell lands of the intestate when full relief against the proposed sale may be had in the proper probate court.<sup>6</sup> Nor can the judgment of such

<sup>1</sup> *Edwards v. Haverstick*, Adm'r, 47 Ind., 138.

<sup>2</sup> *Lucas v. Williams*, 4 DeGex, F. & J., 436.

<sup>3</sup> *Ewing v. Chase*, Adm'r, 2 Del. Ch., 278.

<sup>4</sup> *Dobbs v. Prothro*, 57 Ga., 14.

<sup>5</sup> *Bell v. Craig*, Adm'r, 52 Ala., 215.

<sup>6</sup> *Johnson v. Jones*, 75 N. C., 206; *Bailey v. Ross*, 68 Ga., 735. But see, *contra*, *McCook v. Pond*, 72

court in ordering a sale be questioned collaterally in a suit for an injunction.<sup>1</sup> And an injunction has been refused against an executor, whom it was sought to restrain from receiving payment for lands sold and from making conveyance thereof upon the ground of misconduct, when the parties aggrieved could have ample relief in the probate court.<sup>2</sup> So creditors of a deceased testator who, under the laws of the state, may contest priority of claims against the estate after judgment as well as before, will not be allowed to enjoin other creditors from obtaining judgment against the executor.<sup>3</sup>

§ 1373. The fact that a sale of real estate under a deed of trust in the nature of a mortgage has been enjoined affords no reason why an executor of the deceased mortgagor should be enjoined from making an executor's sale of the premises, or of the interest of the deceased therein, such executor's sale being made *pendente lite* and subject to the lien of the prior deed of trust.<sup>4</sup>

§ 1374. Legacies in the hands of an administrator with the will annexed, pending the settlement of the estate of the deceased, are not subject to levy and sale under execution against the legatee; and the administrator may, therefore, under such circumstances, enjoin the sale.<sup>5</sup>

Ga., 150, where it is held that upon a bill to wind up the affairs of an estate and for an accounting and distribution, a sale of realty by the administrator under an order of the ordinary may be restrained when unnecessary and when the estate is ready for distribution.

<sup>1</sup> Bailey v. Ross, 68 Ga., 735.

<sup>2</sup> Sprinkle v. Hutchinson, 66 N. C., 450.

<sup>3</sup> Turk v. Ross, 59 Ga., 378.

<sup>4</sup> George v. Cooper, 15 West Va., 666.

<sup>5</sup> Stout v. La Follette, 64 Ind., 365.

## CHAPTER XXV.

### OF INJUNCTIONS PERTAINING TO SURETIES.

- § 1375. General rule and its applications.
- 1376. Foundation of the rule.
- 1377. Accommodation indorser.
- 1378. Insolvency of principal; removal of mortgaged property; fraudulent judgment.
- 1379. Effect of statute.
- 1380. Surety in replevin.
- 1381. Judgments against sureties.
- 1382. The same.
- 1383. Ignorance of defense at law.
- 1384. Judgment upon note not merged in that upon injunction bond.
- 1385. Contribution.
- 1386. When suit enjoined; discharge of mortgage by co-surety; equitable defenses.

§ 1375. The appropriate remedy for the protection of sureties, who have been discharged from their liabilities, is by injunction to restrain proceedings at law against them on account of the suretyship.<sup>1</sup> And it is a rule of general application, that wherever the relation of the surety to the debtor is changed without his consent, as by giving the principal debtor an extension of the time of payment unknown to the surety, the latter is thereby discharged in equity, and may perpetually enjoin the creditors from proceeding at law against him for the collection of the debt.<sup>2</sup> Thus, a creditor who enters into an agreement with his principal debtor for forbearance to sue thereby discharges the sureties of the debtor, and if he proceeds to obtain a

<sup>1</sup> *Samuell v. Howarth*, 3 Meriv., 540; *Boulthée v. Stubbs*, 18 Ves., 272; *Allan v. Inman*, 7 Jur., 433. 20; *Bradshaw v. Combs*, 102 Ill.,

<sup>2</sup> *Clark v. Henty*, 3 Y. & C., 187; 428. And see *King v. Baldwin*, 2 *Armistead v. Ward*, 2 Pat. & H., Johns. Ch., 554.  
504; *Rees v. Berrington*, 2 Ves. Jr.,



judgment against the sureties before they have been notified of the contract of forbearance, the judgment will be perpetually enjoined on the application of the sureties.<sup>1</sup> So if the creditor fraudulently aids the principal debtor in absconding, with intent thereby to hinder the surety in his remedy against the principal, the creditor will be enjoined from collecting his debt of the surety.<sup>2</sup>

§ 1376. The rule as above stated is founded in the plainest principles of equity and reason. The surety has the right to insist on a strict performance of the contract to which he has become a party, and he can not be bound by any obligation to which he has not given his consent.<sup>3</sup> A binding and valid contract of forbearance, made by the creditor with his debtor without the surety's consent, by depriving the surety of the right of immediate recourse against his principal debtor, takes away from him the protection to which he is entitled, and deprives him of the equity which he has a right to demand.<sup>4</sup> Nor does the fact that the contract for indulgence is clearly for the benefit of the surety vary the application of the rule, since the surety himself is the proper person to determine whether he is to be benefited thereby.<sup>5</sup>

§ 1377. Upon the principles above laid down the protection of equity has been extended to the case of an accommodation indorser standing in the position of a surety. Thus, where the makers of a promissory note, in a suit prosecuted to a court of final resort, are held not liable on the ground of illegality of consideration, an indorser for accommodation will be allowed to enjoin a judgment obtained against him on the same note, on the ground that the principal being discharged, the surety should also be discharged,

<sup>1</sup> *Armistead v. Ward*, 2 Pat. & H., 504.

<sup>2</sup> *Smith v. Hays*, 1 Jones Eq., 321.

<sup>3</sup> *Samuell v. Howarth*, 3 Meriv., 272; *Bonser v. Cox*, 13 L. J. Ch., 260; *Newton v. Chorlton*, 10 Hare, 649.

<sup>4</sup> *Rees v. Berrington*, 2 Ves. Jr., 540; *Boulton v. Stubbins*, 18 Ves., 20; *Newton v. Chorlton*, 10 Hare, 649.

<sup>5</sup> 2 Story's Eq., § 883; *Samuell v. Howarth*, 3 Meriv., 272; *Calvert v. London*, 2 Keen, 638.

even though he has not used due diligence in defending against the action at law.<sup>1</sup> The rule is to be understood as limited to cases where the agreement for forbearance is founded upon sufficient consideration, and is in its nature such an agreement as the debtor might enforce against the creditor.<sup>2</sup> And where a surety has entered into a bond for the performance by his principal of two separate things, a subsequent variation from the terms of the contract as to one of those things, without the surety's consent, does not release him from his obligation as to the other.<sup>3</sup> Nor will the taking of additional security from the debtor operate as a discharge of the surety, unless taken in place of the original security.<sup>4</sup>

§ 1378. Insolvency of the principal debtor, against whom a judgment has been obtained, and the fact of his having, after the rendition of the judgment, sold property which the purchaser is about to remove from the county, afford sufficient ground for enjoining the removal of the property at the suit of the surety, even although he has not yet been compelled to pay the judgment.<sup>5</sup> So sureties upon an official bond, upon showing that their principal will be in default, and that property mortgaged to them to secure them on account of their suretyship is in danger of being removed, are entitled to the aid of equity to restrain the removal of the mortgaged property.<sup>6</sup> But a surety upon a promissory note for money borrowed, who is compelled to pay the note, can not enjoin the principal debtor from collecting dividends from an insolvent bank in which he had deposited the money so borrowed, even though he is alleged to be insolvent, the surety having no lien upon the fund so deposited.<sup>7</sup>

<sup>1</sup> *Miller v. Gaskins*, Sm. & M. Ch., 524.

<sup>2</sup> *Blake v. White*, 1 Y. & C., 420; *Armisted v. Ward*, 2 Pat. & H., 504; *Keath v. Key*, 1 Y. & J., 434.

<sup>3</sup> *Harrison v. Seymour*, 1 L. R. C. P., 519.

<sup>4</sup> *Eyre v. Everett*, 2 Russ., 331; *Newton v. Chorlton*, 10 Hare, 649.

<sup>5</sup> *Anderson v. Walton*, 35 Ga., 202.

<sup>6</sup> *Outlaw v. Reddick*, 11 Ga., 669.

<sup>7</sup> *Carlton v. Simonton*, 94 N. C., 401.

§ 1379. An injunction granted for the purpose of protecting a person from the sale of his property, to satisfy a debt for which he was simply a surety, will not be dissolved because of a statute conferring upon the court out of which the execution issued power to administer equitable relief, where a judgment is recovered against both principal and surety. The court will be governed in such a case by the principle that the conferring of equitable power upon courts of common law neither impairs nor abridges the jurisdiction of equity, but simply creates a case of concurrent jurisdiction.<sup>1</sup>

§ 1380. Upon the question whether a surety in replevin is entitled to protection by injunction, until the principal debtor is exhausted, the better doctrine is that such a surety is not entitled to an injunction to prevent the levy of an execution on his own property until that of his principal debtor shall have first been levied upon, the protection of the surety's property by compelling a levy on that of the principal being a proceeding unsanctioned either by principle or authority.<sup>2</sup> But in Indiana it would seem that a surety in an action of replevin is entitled to enjoin a levy upon his property before that of the judgment debtor is exhausted; although such injunction is not proper unless the officer is actually threatening or is about to levy an execution upon plaintiff's property, and the mere fact that an execution is in his hands is not sufficient to warrant the relief.<sup>3</sup>

§ 1381. Questions of considerable nicety and importance have occurred touching the extent to which equity may relieve by injunction against judgments at law which have been recovered against sureties. The question of good faith and diligence on the part of the judgment creditor may become a controlling element in cases of this nature. Thus, where judgment is obtained against the principal and sure-

<sup>1</sup> *Irick v. Black*, 2 C. E. Green, 189.

<sup>2</sup> *Kilpatrick v. Tunstall*, 5 J. J. Marsh., 80.

<sup>3</sup> *Elson v. O'Dowd*, 40 Ind., 300.

ties in an appeal bond, and at the time of recovering such judgment the principal in the bond is solvent and the judgment may be realized, but by the delay, laches and bad faith of the judgment creditor and his assigns, the principal debtor becomes insolvent so that the surety loses his recourse against him for indemnity, the enforcement of the judgment against the surety may be enjoined.<sup>1</sup> And where the holder of a promissory note procures judgment thereon against the maker, levies execution upon his land, and afterward, and without the knowledge or consent of the surety postpones the sale, and the maker then becomes insolvent, the surety may enjoin the creditor from satisfying his judgment out of the property of the former, since the action of the creditor in such case operates as a discharge of the surety.<sup>2</sup> So when a surety has paid the amount due from his principal in full, he may be protected by injunction from the enforcement of judgments upon his recognizance for anything more.<sup>3</sup> So when plaintiff, who is indebted to defendant, becomes his surety upon an appeal bond upon an agreement that his indebtedness to defendant shall be first applied in payment of the judgment which may be recovered against the latter in the appeal suit, and defendant, in violation of this agreement, procures judgment upon his demand against the surety, the enforcement of such judgment may be enjoined.<sup>4</sup> But an injunction will not lie to

<sup>1</sup> *Biggerstaff v. Hoyt*, 62 Mo., 481. And in Kansas, the law of the state requiring a creditor to exhaust the property of the principal before that of the surety, the judgment being entered under the practice of the state so as to show the relations of the parties, it is held that a surety can not restrain the enforcement of a judgment by execution against his property upon the ground of a prior agreement with the creditor not to collect the judgment from the principal until he

had exhausted the surety's property, nor upon the ground that the creditor had delayed execution against the principal until he had become insolvent. *Fox v. Hudson*, 20 Kan., 246.

<sup>2</sup> *Parker v. Nations*, 33 Tex., 210.

<sup>3</sup> *In re Herricks Minors*, 3 Ir. Ch., 183.

<sup>4</sup> *Mattingly v. Sutton*, 19 West Va., 19. In Georgia it is held that a surety upon promissory notes may enjoin the enforcement of a judgment against him upon the notes

restrain a judgment against complainant on a note executed by him as surety, the only equity in support of the bill being that fraudulent representations were made by the principal to obtain the signature of the surety, no fraud or misrepresentation being charged upon the payee.<sup>1</sup> And when plaintiffs seek to enjoin the enforcement of a judgment at law against them, upon the ground that they were only sureties upon the note on which the judgment was rendered, and that plaintiff in that action induced them to consent to judgment by default upon assurances that no execution should issue against them, no sufficient ground for relief is presented.<sup>2</sup>

§ 1382. When the holder of a promissory note brings suit against two makers, one of whom occupies the relation of surety to the other, and plaintiff dismisses his suit as to the principal maker, for the purpose of avoiding his plea, and then takes judgment against the surety, the effect being to prevent the surety from recovering against the principal, the note being barred by the statute of limitations, such equities are presented as to warrant an injunction in behalf of the surety to restrain the enforcement of the judgment against him.<sup>3</sup>

§ 1383. A surety, however, will not be allowed to rely upon his ignorance of a substantial defense to an action at law against him as surety, resulting out of transactions between the plaintiff in such action and the principal debtor, as a ground for enjoining the judgment against him, unless he avers in his bill and satisfactorily proves that he took proper steps to ascertain the true state of the

until the determination of the suit against his principal, the undertaking of the surety being only collateral; and this, although the surety has neglected to defend the action. *Norris v. Pollard*, 75 Ga., 358.

<sup>1</sup> *Griffith v. Reynolds*, 4 Grat., 46.

<sup>2</sup> *Mitchell v. Boyer*, 58 Ind., 19.

See, as to circumstances under which a surety may enjoin the enforcement of a judgment against him until another security for the same debt has been exhausted, *Meade v. Grigsby's Adm'rs*, 26 Grat., 612.

<sup>3</sup> *Turner v. McCarter*, 42 Ga., 491.

case and to prepare his defense in the action at law, or that he was prevented by circumstances which rendered it impossible for him so to do.<sup>1</sup> And a surety upon a bond given in the course of judicial proceedings, upon which judgment has been rendered, can not enjoin execution under the judgment upon grounds of which he might, with due diligence, have availed himself in defense of the action.<sup>2</sup>

§ 1384. Where judgment is obtained against the principal and his sureties upon a promissory note, and the principal enjoins the judgment, giving other sureties upon the injunction bond, and the injunction is afterward dissolved and judgment rendered upon the bond, which is satisfied in part upon execution, the original judgment upon the note is not merged in that upon the injunction bond; the sureties upon the original note can not, therefore, restrain the enforcement of the judgment against them.<sup>3</sup>

§ 1385. It is held that one surety can not by injunction restrain proceedings at law by his co-surety for contribution unless he tenders the amount due the co-surety who has paid the debt, or alleges his readiness to pay.<sup>4</sup> And the fact that an administrator has wasted the estate, and one of his sureties is threatened with suit by the legatees of the estate to make good such *devastavit*, would seem to be insufficient ground for enjoining the enforcement of a judgment in favor of the heirs of a co-surety upon the administrator's bond, upon a bill seeking to enforce contribution out of such judgment as assets of the co-surety's estate.<sup>5</sup>

§ 1386. Where a surety has entered into an obligation in writing, upon the understanding and faith of another person also executing the agreement as co-surety, which the latter fails to do, the surety may have the aid of an injunction to restrain proceedings at law upon the written instru-

<sup>1</sup> *Smith v. McLain*, 11 West Va., 654. See also *Gatewood v. Burns*, 99 N. C., 357.

<sup>2</sup> *Clegg v. Darragh*, 63 Tex., 357.

<sup>3</sup> *Gowan v. Graves*, 10 Heisk., 579.

<sup>4</sup> *Craig v. Ankeney*, 4 Gill, 225.

<sup>5</sup> *Poullain v. English*, 57 Ga., 492.

ment.<sup>1</sup> And one of two sureties may have an injunction to prevent a co-surety from discharging a mortgage given to secure the two sureties, and from dismissing a suit which is being prosecuted for their protection.<sup>2</sup> So the prosecution of an action at law against a surety upon an official bond may be enjoined upon the ground of equitable defenses which can not be interposed in defense of the action.<sup>3</sup>

<sup>1</sup> *Evans v. Bremridge*, 8 DeGex, M. & G., 100, affirming S. C., 2 Kay & J., 174.

<sup>2</sup> *Sheehan v. Taft*, 110 Mass., 331. The doctrine was stated by Lord Hardwicke that a surety upon an official bond might enjoin a suit against him upon the bond until an account could be taken of

whether anything was due to the plaintiff; since there might be a breach of the condition of the bond, yet nothing due. *Peck v. Payne*, Ca. temp. H., 295. It is doubtful, however, whether such a doctrine would now be recognized or enforced.

<sup>3</sup> *Penn v. Ingles*, 82 Va., 65.

## CHAPTER XXVI.

### OF INJUNCTIONS BETWEEN HUSBAND AND WIFE.

- § 1387. Sale of wife's property for husband's debts enjoined.
- 1388. Further illustrations.
- 1389. Sale of wife's personal property enjoined.
- 1390. Purchase money furnished by husband.
- 1391. When husband and wife enjoined from incumbering.
- 1392. General doctrine further illustrated.
- 1393. Injunction pending proceedings for divorce.
- 1394. Apprehensions of abandonment insufficient.
- 1395. Extent of injunction in divorce proceedings.
- 1396. Choses in action; transfer of real property.
- 1397. Partnership.
- 1398. Further illustrations.
- 1399. Separation deeds.
- 1400. Ante-nuptial contract.
- 1401. Injunction denied against suit for dower.

§ 1387. The most frequent ground for invoking the aid of equity by injunction, in matters growing out of or dependent upon the relation of husband and wife, is in cases where it is sought to protect the separate property of the wife from being taken in satisfaction of the liabilities of the husband. And the doctrine is well established by a uniform current of authority that an injunction is the appropriate remedy for the protection of a married woman in the enjoyment of her separate property, as against the husband or his creditors, and courts of equity will freely interpose their preventive aid in such cases.<sup>1</sup> Thus, an injunction

<sup>1</sup>Green v. Green, 5 Hare, 399, Ala., 221; Deville v. Hayes, 23 La. note b; Johnson v. Vail, 1 McCart., An., 550; Fairchild v. Knight, 18 423; Hill v. Bowman, 35 Mich., Fla., 770. And see Chavez v. 191; Patterson v. Fish, Ib., 209; McKnight, 1 New Mexico, 147; Lewis v. Winston, 26 La. An., 707; Pearson v. Denham, 78 Ga., 545. Holthaus v. Hornbostle, 60 Mo., But see Bell v. Francke, 23 La. 439; Brevard's Ex'rs v. Jones, 50 An., 599.



will lie at the suit of a married woman to restrain the sale of her own separate personal property upon execution under a judgment against her husband.<sup>1</sup> So a married woman may enjoin the sale of her lands on execution under a judgment against her husband.<sup>2</sup> The exercise of the jurisdiction in such cases has been based upon the necessity of preventing a cloud upon title, and it has been held that, in the event of ejectment being brought by a purchaser at such sale, the wife would be compelled to give evidence *dehors* the conveyance from her grantor to show that she bought and paid for the property with her separate funds.<sup>3</sup> So a sale of the wife's property, held in trust by the husband, under execution against him, may be enjoined.<sup>4</sup> And where property is settled upon the wife before marriage as her separate property, in trust for her sole use and benefit, she is entitled to the aid of equity to restrain her husband from interfering therewith.<sup>5</sup> And a creditor of the husband will be enjoined from selling the proceeds of the wife's real estate in satisfaction of his debt against the husband, although such proceeds have been raised by the labor of the wife and minor children of the husband. And the fact that the husband in such case has not been joined as a defendant in the action will not warrant a dissolution, but leave will be given to amend.<sup>6</sup> So where an execution against a husband is levied upon property of the wife, her title to which is founded upon a purchase at a sheriff's sale under an execution in her favor and against her husband upon a decree in chancery, and a contest at law would involve transactions between the husband and wife and rights of property which are per-

<sup>1</sup> *Holthaus v. Hornbostle*, 60 Mo., 439; *Fairchild v. Knight*, 18 Fla., 770. *v. Rosenthal*, 58 Tex., 4; *Rea v. Longstreet*, 54 Ala., 291.

<sup>2</sup> *Hill v. Bowman*, 35 Mich., 191; *Patterson v. Fish*, *Ib.*, 209; *Fairchild v. Knight*, 18 Fla., 770; *City of Cleburne v. Gulf, C. & S. F. R. Co.*, 66 Tex., 457; *Tibbetts v. Fore*, 70 Cal., 242. See, *contra*, *Spencer* *v. Tibbetts*, 70 Cal., 242. <sup>3</sup> *Tibbetts v. Fore*, 70 Cal., 242. But see, *contra*, *Rea v. Longstreet*, 54 Ala., 291.

<sup>4</sup> *Simrall v. Grant*, 79 Ky., 435. <sup>5</sup> *Green v. Green*, 5 Hare, 399, note b.

<sup>6</sup> *Johnson v. Vail*, 1 McCart., 423.

haps sustainable only in equity, the wife may maintain a bill to establish her rights and to enjoin a sale under execution against her husband.<sup>1</sup> And where land is conveyed to a husband and wife and to a third person, the husband and wife take by entireties and the land is not subject to execution for the husband's debts. Equity will, therefore, in such case enjoin a sale of the lands under execution against the husband.<sup>2</sup> So when property is conveyed by a husband, the wife joining, to a third person in trust that it shall be reconveyed to the wife, such grantee having no beneficial interest and only taking the title in trust for the wife, the sale of the property under execution against the trustee may be enjoined.<sup>3</sup>

§ 1388. In accordance with the general principle that a sale of a wife's property to satisfy a debt of her husband affords good ground for the interference of equity, where the judgment creditors of the husband purchase a mortgage upon the wife's land, and issue execution thereon for the purpose of securing their judgments against the husband, they may be enjoined from proceeding until they shall execute an assignment of the mortgage to the wife, upon her payment of the mortgage debt, with interest and costs.<sup>4</sup> So the wife may enjoin the prosecution of repeated actions of ejectment by a purchaser of her property at a sale under execution against her husband, when such actions are prosecuted with a view of harassing the wife and have the effect of clouding her title.<sup>5</sup> Where, however, the case is simply one of a conflict of interest, the wife's title being disputed and the creditor having a right to proceed against the property to test her title, it is error for a court of equity to assume jurisdiction, and, by restraining the execution, to thus withdraw the questions in dispute from a trial by jury.<sup>6</sup> Nor can the husband prevent by injunction the sale of his

<sup>1</sup> *Brevard's Ex'rs v. Jones*, 50 Ala., 221.

<sup>2</sup> *Hulett v. Inlow*, 57 Ind., 412.

<sup>3</sup> *Cox v. Arnsmann*, 76 Ind., 210.

<sup>4</sup> *Lyon's Appeal*, 61 Pa. St., 15.

<sup>5</sup> *Thompson's Appeal*, 107 Pa. St., 559.

<sup>6</sup> *Winch's Appeal*, 61 Pa. St., 424.

property on execution against himself, upon the ground that he has transferred the property to his wife for a debt due her, since if the wife does not complain of such proceedings the husband will not be allowed relief.<sup>1</sup> And an injunction will not lie to restrain the execution of a judgment in forcible entry and detainer against a husband, for land claimed by the wife as her separate estate, upon the ground that the wife was not a party to the proceedings.<sup>2</sup> So when the husband is in apparent possession and active control of the property, dealing with it as his own, it is incumbent upon the wife who seeks to restrain its sale under execution against the husband to establish by clear and undoubted proof a *bona fide* title, and her mere assertion of such title will not warrant the relief.<sup>3</sup> Nor will the injunction be granted when the wife's title is under a voluntary conveyance from the husband after incurring the indebtedness upon which the judgment was recovered against him, and with intent to defraud his creditors.<sup>4</sup> And when, under the laws of the state, the wife may contract debts in conducting business upon her own account, and a judgment for an indebtedness so contracted becomes a lien upon her separate real estate, she can not enjoin its sale under such judgment.<sup>5</sup> Nor can a widow enjoin a sale of property of her deceased husband by his judgment creditors, upon a bill claiming dower in the premises, when she is in possession and when notice of her rights at the sale will afford ample protection, such sale being subject to her rights.<sup>6</sup>

§ 1389. A married woman is entitled to the aid of an injunction to restrain a sale of her separate personal property under proceedings in replevin, instituted by her husband in her name, but without her knowledge or consent, the judgment in such replevin suit being void, and there being no adequate remedy at law.<sup>7</sup>

<sup>1</sup> *Burus v. Bidwell*, 23 La. An., 296.

<sup>2</sup> *Saunders v. Webber*, 39 Cal., 287.

<sup>3</sup> *Erdman v. Rosenthal*, 60 Md., 312.

<sup>4</sup> *May v. Huntington*, 66 Ga., 208.

<sup>5</sup> *Burk v. Platt*, 88 Ind., 283.

<sup>6</sup> *Jackson v. Rainey*, 64 Ga., 311.

<sup>7</sup> *Sayles v. Mann*, 4 Bradw., 516.

§ 1390. While equity extends its protection to the separate estate of the wife, as against creditors of the husband, yet if the legal title to the property levied upon be in the husband, who has himself furnished a portion of the purchase money, the court will not interfere. Thus, where the wife has negotiated for the purchase of certain real estate, but the conveyance is made to the husband, he paying a portion of the purchase money, and she the remainder from her own earnings, no such trust results to the wife as entitles her to an injunction to restrain a judgment creditor of the husband from satisfying his judgment out of the land in question.<sup>1</sup> If, however, the purchase money proceeds entirely from the wife, the title being taken in the name of the husband, the transaction being in good faith and with no intention to defraud creditors, a sale under execution against the husband may be enjoined.<sup>2</sup>

§ 1391. Although it is a general and well established rule that courts of equity will not, at the suit of a general creditor, whose claim is not yet reduced to judgment, restrain a debtor from such disposition of his property as he may see fit to make, yet upon a bill filed against husband and wife to have certain debts contracted by the wife declared a lien upon her separate estate, defendants may be enjoined from conveying or incumbering such estate. The relief is granted in such a case upon the ground that the wife's separate property is considered in equity as charged with all debts contracted by her with reference, express or implied, to payment out of such property, and if a bill will lie to make such debts a charge upon the wife's estate, equity may properly prevent the alienation or incumbering of the estate until the relief sought by the bill can be obtained.<sup>3</sup>

§ 1392. Where by statute the wife's real estate is ex-

<sup>1</sup> *Skillman v. Skillman*, 2 McCart., 479. See also *Dunn v. Baxter*, 30 West Va., 672.

393; *Cunningham v. Bell*, 83 N. C., 328.

<sup>3</sup> *Oakley v. Pound*, 1 McCart.,

<sup>2</sup> *Cass v. Demarest*, 37 N. J. Eq., 178.

pressly exempted from sale under execution by creditors of the husband, an injunction is the proper remedy for the protection of the property against such sale, and it is error to dismiss a bill filed by the wife for this purpose.<sup>1</sup> But a court of equity will not entertain jurisdiction to restrain the husband, upon the application of the wife, from obtaining possession of her separate estate, where he has not instituted proceedings in any court, either of law or of equity, to obtain control of the property.<sup>2</sup> Nor is the husband, while acting in the capacity of administrator of the estate of his deceased wife, and having no other interest in the premises, entitled to an injunction to prevent the sale of real estate of the wife under a trust deed.<sup>3</sup>

§ 1393. The aid of equity by injunction is most frequently sought, as between husband and wife, in cases of application for divorce from the bonds of matrimony, and it may be stated as a general rule that, pending proceedings for divorce, a proper case of emergency being shown, the husband may be enjoined from interfering with the custody of the children or of property in possession of the wife.<sup>4</sup> So the husband will be enjoined from disposing of his property in such manner as to prevent the wife from obtaining alimony, or a separate maintenance, on a bill pending for that purpose.<sup>5</sup> And upon a bill filed by the wife for divorce and alimony, the husband, being served with process and not appearing, may properly be enjoined from alienating his property in such way as to prevent her from obtaining alimony.<sup>6</sup> So in an action for divorce brought by the wife the court may enjoin the enforcement of judgments which the husband has fraudulently caused

<sup>1</sup> Hunter's Appeal, 40 Pa. St., 194. (Ohio), 492; Johnson v. Johnson,

<sup>2</sup> Parsons v. Parsons, 9 N. H., 309. Ib., 454; Bascom v. Bascom, Ib., 632; Springfield M. & F. I. Co. v. Peck, 102 Ill., 265; Gray v. Gray, 65 Ga., 193.

<sup>3</sup> Stringham v. Brown, 7 Iowa, 33. <sup>4</sup> Wilson v. Wilson, Wright (Ohio), 129; Edwards v. Edwards, Ib., 308.

<sup>5</sup> Questel v. Questel, Wright Iowa, 696. <sup>6</sup> Ricketts v. Ricketts, 4 Gill, 105. See also Wharton v. Wharton, 57

to be recovered against himself and in favor of his children to defeat the rights of the wife.<sup>1</sup> And an injunction has been granted, pending a bill for divorce brought by the wife, to restrain the husband from interfering with her separate property until the final hearing of the cause.<sup>2</sup>

§ 1394. Mere apprehension of abandonment by the husband, and of failure to support the wife, is not sufficient cause to warrant the interposition of equity in restraining him from disposing of his property, since injunctions are not usually allowed upon mere apprehensions of future wrong. And where a preliminary injunction has been allowed in such a case, it will be dissolved on the coming in of the answer denying any intention on the part of the husband to abandon his wife.<sup>3</sup>

§ 1395. An injunction obtained by the wife against the husband, pending proceedings for divorce, will restrain him from incumbering as well as from selling his property.<sup>4</sup> But the wife will not be allowed in such case to restrain the husband from using his property for the support of himself and his children, nor will he be enjoined from using the tools of his trade, or from carrying on his ordinary business.<sup>5</sup> And on granting a decree of divorce in favor of the wife, it is improper to perpetually enjoin the husband from selling his property to insure the payment of alimony.<sup>6</sup>

§ 1396. In a proceeding by a wife against the husband for a divorce *a vinculo* she is not entitled to restrain him from collecting his choses in action, unless it is apparent that the safety of the fund will be imperiled by permitting him to reduce it to possession.<sup>7</sup> And when in an action for divorce and alimony brought by the wife against the husband a preliminary injunction is granted to prevent the transfer of the husband's real estate, and upon the final

<sup>1</sup> Busenbark v. Busenbark, 33 Kan., 572.

<sup>2</sup> Symonds v. Hallett, 24 Ch. D., 346.

<sup>3</sup> Anshutz v. Anshutz, 1 C. E. Green, 162.

<sup>4</sup> Vanzant v. Vanzant, 23 Ill., 536.

<sup>5</sup> Rose v. Rose, 11 Paige Ch., 166.

<sup>6</sup> Errissman v. Errissman, 25 Ill., 136.

<sup>7</sup> Johnson v. Johnson, 59 Ga., 613.

hearing the divorce is granted with permanent alimony, it is error to perpetually restrain the transfer of defendant's real property, but the decree for alimony should be made a lien thereon, and the injunction should be dissolved.<sup>1</sup>

§ 1397. Equity will not enjoin defendants from disposing of real property upon a bill by a married woman claiming that the property was purchased with her individual funds, which had been by her husband invested in a partnership business and which finally became invested in the real estate in question which was sold to defendants, when it does not clearly appear that the money was put into the firm business without the wife's knowledge or consent, and when notice to the purchasers of her equity is not shown. The pendency of the bill in such a case, being *lis pendens*, is regarded as a sufficient protection to the wife.<sup>2</sup>

§ 1398. Where an action at law is brought against the husband's executors, to recover the price of goods sold to the wife during the life-time of the husband, and while she was living apart from him upon a separate maintenance, the bill alleging that this fact was known to the tradesman when the goods were sold, a court of equity will not interfere by injunction, after verdict, since the facts alleged as the ground for equitable relief would have been a proper defense at law.<sup>3</sup> And where, in a deed of separation between husband and wife, the husband condones all offenses then committed, and agrees not to institute proceedings for a divorce upon any ground of complaint existing prior to the deed, an injunction will not be allowed against a divorce suit afterward instituted by the husband, who alleges that he executed the deed on the wife's assurance that she had not committed adultery, which proved to be false, since such contract may be relied upon in defense of the action

<sup>1</sup>Draper v. Draper, 68 Ill., 17. Hampshire, Higgins v. Higgins, 57 N. H., 224.  
See as to the right to an injunction to restrain a father from interference with a child, in an action for divorce under the laws of New

<sup>2</sup>Bryan v. King, 51 Ga., 291.

<sup>3</sup>Ferrars v. Ferrars, 1 Vern., 71.

for divorce.<sup>1</sup> But where a father, who has committed a criminal assault upon his infant daughter, executes an instrument giving to the wife the sole control of his children, he may be restrained from any proceedings to obtain the children from the wife's custody, and from interfering with her in their management and protection.<sup>2</sup> And the interference of equity will be allowed, in a proper case, to prevent the father from removing his child out of the country and beyond the jurisdiction of the court.<sup>3</sup> So, too, in the exercise of its jurisdiction for the care of infants, equity may by injunction restrain an infant from contracting an improper marriage, upon a bill filed for the execution of the trusts of a settlement for the benefit of the infant.<sup>4</sup>

§ 1399. When husband and wife have separated and have executed a separation deed, covenanting that the wife may live apart from the husband, and that he will not compel her to cohabit or to live with him, by legal proceedings or otherwise, an injunction may be allowed to prevent a violation of the covenant by the husband instituting proceedings in the divorce court for the restitution of conjugal rights.<sup>5</sup> Where, however, husband and wife enter into a separation deed or agreement in which all past offenses are condoned, and it is covenanted that no proceedings shall be instituted by either party against the other for any cause existing before the execution of the deed, and the husband afterward brings an action for divorce, equity will not enjoin such action, the husband claiming to have executed such deed under misrepresentation and deceit as to the wife's conduct, when the deed may be set up in defense of the action for divorce.<sup>6</sup>

§ 1400. Where one is indebted to a woman before her marriage, and after her marriage judgment is entered

<sup>1</sup> *Brown v. Brown*, 33 L. J. Ch., 153.

<sup>2</sup> *Swift v. Swift*, 34 Beav., 266.

<sup>3</sup> *DeManneville v. DeManneville*, 10 Ves., 52.

<sup>4</sup> *Dawson v. Thompson*, 12 L. T. N. S., 178.

<sup>5</sup> *Hunt v. Hunt*, 4 De Gex, F. & J., 221.

<sup>6</sup> *Brown v. Brown*, L. R. 7 Eq., 185.



against him upon the debt in the name of husband and wife, the judgment debtor can not restrain the enforcement of such judgment upon the ground of an ante-nuptial contract between husband and wife, which sought to place her property under the protection of a trustee for her benefit, the agreement being of a private and secret nature and never being recorded, since payment under the judgment would, in such case, be a complete bar to any future claim by the trustee of the wife.<sup>1</sup> Where, however, by an ante-nuptial agreement the husband was to conduct the wife's farm, she agreeing that the products of the farm should be contributed to the support of the family during their marriage, and upon the faith of such agreement the husband made extensive improvements at his own expense, he was allowed to enjoin a grantee of the wife, with full notice, from interfering with his rights in the premises.<sup>2</sup>

§ 1401. As regards the right to relief by injunction against the prosecution of suits for dower, equity will not lend its aid by injunction to restrain a widow from prosecuting her claim for dower in the lands of her deceased husband, when the bill fails to show anything which would be a bar in law to the right of dower.<sup>3</sup>

<sup>1</sup> *Hill v. Garman*, 2 Del. Ch., 273.

<sup>3</sup> *Kenan v. Johnson*, 48 Ga., 28.

<sup>2</sup> *Stratton v. Stratton*, 58 N. H., 473.

## CHAPTER XXVII.

### OF INJUNCTIONS IN BEHALF OF CREDITORS.

- § 1402. Transfers in fraud of creditors enjoined.
- 1403. Creditors without judgment denied relief.
- 1404. Creditor having lien entitled to relief.
- 1405. Rights of attaching creditors.
- 1406. Exceptions to the general rule.
- 1407. The general doctrine as modified by legislation.
- 1408. English and Irish practice in creditors' suits.
- 1409. The same.
- 1410. Supplemental proceedings under code practice.
- 1411. Voluntary assignment for benefit of creditors.
- 1412. Conflicting claimants under executions.
- 1413. Misappropriation of fund.
- 1414. Creditors subsequently joining in cause.
- 1415. Accounting between principal and agent.

§ 1402. The preventive jurisdiction of equity is frequently invoked for the protection of creditors against the fraudulent conduct of their debtors, and fraudulent transfers of property designed to give preference to certain creditors over others, or for the purpose of delaying and hindering creditors, are frequently made the foundation for relief by injunction. It may be laid down as a general rule that equity will enjoin any transfers of a debtor's property made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors preference over others.<sup>1</sup> And where the main purpose of the bill is to set aside a fraudulent transfer of a debtor's goods and effects, made to delay and hinder his creditors, an injunction is regarded as

<sup>1</sup>Hyde v. Ellery, 18 Md., 496; under a valid deed of trust, the Witmer's Appeal, 45 Pa. St., 455. sale itself being intended to defraud creditors, and to redeem from the lien of such incumbrance, see Findley v. Findley, 93 Mo., 493.

a necessary adjunct, and is granted as auxiliary to the general relief sought.<sup>1</sup>

§ 1403. It is to be observed, however, that the jurisdiction is not exercised in favor of mere contract creditors, or creditors at large, whose claims are not yet reduced to judgment, and in the absence of statutory provisions authorizing the relief, courts of equity will not, at the suit of other than a judgment creditor, interfere by injunction to restrain a debtor from any disposition of his property, however fraudulent, which he may see fit to make.<sup>2</sup> The principle on which the rule is based is that until the creditor has established his claim by judgment he has no right to question the acts of his debtor and has no concern with his frauds; and to allow the interference, in behalf of mere general creditors, before judgment, would lead to an unjustifiable and often oppressive interruption of the exercise of the debtor's right to control his property.<sup>3</sup> And to

<sup>1</sup> *Hyde v. Ellery*, 18 Md., 496.

<sup>2</sup> *Wiggins v. Armstrong*, 2 Johns. Ch., 144; *Holdrege v. Gwynne*, 3 C. E. Green, 26; *Young v. Frier*, 1 Stockt., 465; *Uhl v. Dillon*, 10 Md., 500; *Rich v. Levy*, 16 Md., 74; *Balls v. Balls*, 69 Md., 388; *McGoldrick v. Slevin*, 43 Ind., 522; *Mills v. Northern R. Co.*, L. R. 5 Ch., 621; *Oberholser v. Greenfield*, 47 Ga., 530; *Johnson v. Farnum*, 56 Ga., 144; *Mayer v. Wood*, 56 Ga., 427; *Dortic v. Dugas*, 52 Ga., 231; *Hart v. Hart*, 52 Ga., 376; *Peyton v. Lamar*, 42 Ga., 131; *Dodge v. Pyrolusite Manganese Co.*, 69 Ga., 665; *Crowell v. Horacek*, 12 Neb., 622; *Angell v. Draper*, 1 Vern., 399; *Shirley v. Watts*, 3 Atk., 200; *Bennet v. Musgrave*, 2 Ves., 51; *Phelps v. Foster*, 18 Ill., 309; *Bigelow v. Andress*, 31 Ill., 322; *Rhodes v. Cousins*, 6 Rand., 188. But see, *contra*, *Cottrell v. Moody*, 12 B. Mon., 500; *Haggarty v. Pittman*, 1

*Paige*, 298; *Rosenberg v. Moore*, 11 Md., 376; *Ellett v. Newman*, 92 N. C., 519; *Frank v. Robinson*, 96 N. C., 28. And see *Cohen v. Meyers*, 42 Ga., 46; *Wachtel v. Wilde*, 58 Ga., 50.

<sup>3</sup> *Wiggins v. Armstrong*, 2 Johns. Ch., 144. Kent, Chancellor, observes: "This is a case of a creditor on simple contract, after an action commenced at law, and before judgment, seeking to control the disposition of the property of his debtor, under judgments and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs; but, upon examination of the cases, I am satisfied that a creditor at large, and before judgment and execution, can not be entitled to the interference which has been granted in this case. In *Angell v. Draper* (1 Vern., 399), and *Shirley v. Watts* (3 Atk., 200), it was held, that the

warrant the relief in behalf of a creditor whose demand is not reduced to judgment or lien, there must be some other

creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennet v. Musgrave*, (2 Ves., 51), and in a case before Lord Nottingham, cited in *Balch v. Wastall* (1 P. Wms., 445), the same doctrine was declared, and so it is understood by the elementary writers. (Mitford, 115; Cooper, Equ. Pl., 149.) The reason of the rule seems to be that, until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall, accordingly, grant the motion for dissolving the injunction." So it is said in *Rhodes v. Cousins*, 6 Rand., 188, to be "well settled law that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction. A creditor must have proceeded as far as he can at law. If he means to affect the land, he must have a judgment at law and take his *elegit*. If the personalty, there must be a judgment and execution issued and he must show in his bill that he has done this, or it

may be demurred to." An exception has been taken in the case of trespass for malicious injury to property, and a plaintiff, in such case, before judgment recovered, has been allowed to enjoin defendants from fraudulently disposing of their property to evade the payment of such damages as might be awarded in the action at law, the relief being granted on the ground that the ancillary jurisdiction of the court of equity by injunction was necessary for the protection of plaintiff in his legal remedy. *Cottrell v. Moody*, 12 B. Mon., 500. And in *Rosenberg v. Moore*, 11 Md., 376, an injunction was granted and a receiver appointed in behalf of general creditors, before judgment, upon the ground of a fraudulent conveyance by the debtor of a portion of his property in trust for his creditors, and upon the further ground that the property was in imminent danger, being in the custody of a person of notoriously bad character. But it does not appear from the case as reported that the objection was made that plaintiffs had no judgment or lien upon the property in controversy. So in *Haggarty v. Pittman*, 1 Paige, 298, an injunction and a receiver were allowed in behalf of creditors without judgment, upon a bill alleging insolvency of the debtor, and that he had made an assignment of his property to one of his creditors who was himself insolvent. These cases, however, are clearly irreconcilable with the decided weight of authority, as above shown.

equity than the mere existence of a demand and the probability that defendant will not apply his property to its settlement.<sup>1</sup> So an injunction has been refused, pending a trial at law, where it was sought to restrain defendants from disposing of their goods in order that they might be levied upon under the judgment not yet obtained.<sup>2</sup> So where a clerk has embezzled the goods of his employers and converted them into money which he has deposited in bank to his own credit, he will not be enjoined from disposing of the money on the ground that he has no other property and is about to leave the country, it not appearing that the money was the specific money of complainants, or that it had arisen from the sale of their goods.<sup>3</sup> And a simple contract creditor, who has no lien upon his debtor's property, will not be allowed to enjoin a sale of such property under a mortgage given by the debtor.<sup>4</sup> So creditors whose demands are not reduced to judgment are not entitled to an injunction and a receiver because of their debtor having entered an appearance and consented to judgment in actions brought by other creditors upon debts justly due, since it is the right of a debtor to prefer any creditor if he so choose.<sup>5</sup> Nor can a mere contract creditor of a railway company interfere by injunction with the disposition of the assets of the corporation, when he has no lien or security thereon.<sup>6</sup> So the confession of judgment by a debtor in

<sup>1</sup> *Peyton v. Lamar*, 42 Ga., 131. See also *Cubbedge v. Adams*, 42 Ga., 124.

<sup>2</sup> *Phelps v. Foster*, 18 Ill., 309.

<sup>3</sup> *McKenzie v. Cowing*, 4 Cranch C. C., 479.

<sup>4</sup> *Peyton v. Lamar*, 42 Ga., 131.

<sup>5</sup> *McGoldrick v. Slevin*, 43 Ind., 522.

<sup>6</sup> *Mills v. Northern R. Co.*, L. R. 5 Ch., 621. Lord Chancellor Hatherley says, p. 628: "I have never before heard — and I have asked in vain for any such precedent — of any attempt on the part of a cred-

itor to file a bill of this description against a company, claiming the interference of the court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called upon to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not

favor of some of his creditors, who have instituted suits against him for the recovery of their demands, will not warrant an injunction against the enforcement of such judgments, upon the application of other creditors without judgments.<sup>1</sup> And the mere fact that a judgment, if recovered against a debtor, will lessen his ability to pay his other debts affords no ground for another creditor to enjoin the prosecution of the former suit.<sup>2</sup>

§ 1404. If, however, the creditor has a lien or charge upon the property of his debtor, even though his demand may not be reduced to judgment, he occupies a different relation from that of a mere contract creditor, and may properly invoke the preventive powers of the court for his protection. For example, persons who have advanced money for repairs and supplies to a vessel, and who have received from the master an assignment of all the freight money and earnings of the vessel upon her voyage, and all lien and interest which he as master had therein, may be allowed an injunction to prevent interference with the collection of the freight and a receiver to collect it, when it is shown that the owners are insolvent, and that the relief is necessary to protect the lien acquired by such assignment.<sup>3</sup> And when, by agreement between them, the debtor gives his creditor an equitable charge upon a particular fund coming to the debtor, in consideration of which the creditor forbears to enforce his judgment, he may enjoin the debtor from receiving the fund out of court until payment of his judgment.<sup>4</sup> So a judgment creditor, after return of execution *nulla bona*, may enjoin a sheriff who has money in his hands belonging to the debtor from payment to the debtor, the latter being insolvent and the bill seeking to subject the money to the payment of plaintiff's judgment.<sup>5</sup> But upon

established in a court of justice, but which he was about to proceed to establish." <sup>3</sup> *Sorley v. Brewer*, 18 How. Pr., 276.

<sup>1</sup> *McGoldrick v. Slevin*, 43 Ind., 522.

<sup>4</sup> *Riccard v. Prichard*, 1 Kay & J., 277.

<sup>2</sup> *McBride v. Little*, 115 Mass., 308.

<sup>5</sup> *Ward v. Whitfield*, 64 Miss., 754. As to the right of a creditor

a bill by a judgment creditor to set aside a conveyance of his property by the debtor upon the ground of fraud, the grantees of the debtor in possession will not be enjoined from cutting and removing wood from the land, when its value without the wood is amply sufficient to satisfy the demand of such creditor, if the conveyance is set aside.<sup>1</sup>

§ 1405. Upon the question whether an attaching creditor, whose demand is not yet reduced to judgment, may properly invoke the aid of equity to enjoin a transfer of the debtor's property, the authorities are not altogether uniform. The weight of authority, however, seems clearly to support the doctrine that an attaching creditor has a sufficient interest in or lien upon the property of his debtor to entitle him to relief by injunction against a transfer by the debtor of his property.<sup>2</sup> And when notice of garnishment has been served upon a garnishee under attachment proceedings, the sale of property in his hands under judgments recovered against the debtor subsequent to the attachments may be enjoined.<sup>3</sup> So it is held that the lien obtained by an attachment suit is sufficient to entitle the attaching creditor to enjoin a sale of the attached property, under a fraudulent proceeding by a distress for rent against the debtor.<sup>4</sup>

§ 1406. While, as has thus been shown, the general doctrine is well established that equity will not interfere by injunction in behalf of creditors before judgment to restrain any disposition or transfer of the property of their debtor, an exception has been recognized when the relief was nec-

claiming an equitable lien upon the debtor's stock of goods, under a parol agreement to mortgage the goods as security for such creditor, to restrain the debtor from disposing of the property, see *Triebert v. Burgess*, 11 Md., 452.

<sup>1</sup> *Portland Building Association v. Creamer*, 34 N. J. Eq., 107.

<sup>2</sup> *Heyneman v. Dannenberg*, 6 Cal., 376; *Joseph v. McGill*, 52

*Iowa*, 127; *Blum v. Schram*, 58 Tex., 524; *Meacham Arms Co. v. Swarts*, 2 Wash., 412. See, *contra*, *Martin v. Michael*, 23 Mo., 50. And see *Conover v. Ruckman*, 33 N. J. Eq., 303.

<sup>3</sup> *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635.

<sup>4</sup> *Cogburn v. Pollock*, 54 Miss., 639.

essary for the prevention of a multiplicity of suits. Thus, where the debtors were beyond the jurisdiction of the court, but had assets within its jurisdiction in the hands of an agent, and their creditors were exceedingly numerous and there were many conflicting claimants for an equitable priority in the assets, it was regarded as an appropriate remedy to enjoin the prosecution of attachment suits brought by different creditors against the assets, in order that the rights of all parties might be determined in one proceeding in equity.<sup>1</sup> So where the demand of creditors is for supplies actually furnished their debtor and entering into the goods which he manufactures, in consideration of which a portion of the goods is sold to plaintiffs and partly delivered under the sale, it is proper to enjoin an attempt by other creditors to get possession of such goods upon facts tending to show a fraudulent conspiracy to defeat the rights of plaintiffs.<sup>2</sup> And where under the laws of the state all debts due from a deceased person become a lien upon his real property from the time of his death, creditors are entitled to the aid of equity to enjoin a fraudulent transfer of his real estate made by their debtor in his lifetime.<sup>3</sup>

§ 1407. The general rule denying relief by injunction against transfers of their debtor's property in behalf of creditors whose demands have not been reduced to judgment has been modified by legislation in some of the states. But even under such legislation specific averments of fraud must be shown to warrant the relief, since in such cases the courts require strong *prima facie* evidence of the facts on which complainant's equity rests.<sup>4</sup> And allegations

<sup>1</sup> *Ballin v. Ferst*, 55 Ga., 546. See *Seligman v. Ferst*, 57 Ga., 561.

<sup>2</sup> *Smith v. McElwain*, 57 Ga., 247.

<sup>3</sup> *Appeal of Fowler*, 87 Pa. St., 449.

<sup>4</sup> *Lanpheimer v. Rosebaum*, 25 Md., 219. Under the statutes of Indiana it is held that a creditor be-

fore judgment may, in cases of emergency, restrain the removal or disposal of his property by the debtor. *Morey v. Ball*, 90 Ind., 450. And under a statute of Pennsylvania providing that the debts of a decedent shall be a lien upon his real estate for five years after



that complainant fears and believes that defendant is about to perpetrate a fraud upon him by placing his effects beyond the reach of his creditors are not sufficient to justify the court in granting relief.<sup>1</sup> But it has been held under a statute authorizing injunctions in behalf of general creditors before judgment, to prevent a fraudulent disposition of the debtor's property, that allegations that the debtor has, by a fraudulent bill of sale, placed his property beyond the reach of legal process, are as effective as averments of insolvency, and it appearing that no other property of the debtor can be found, save that covered by the bill of sale, the injunction should be awarded.<sup>2</sup>

§ 1408. Under the practice of the English and Irish Courts of Chancery, after a decree for an accounting in a creditor's suit for the administration of the assets of a deceased debtor, injunctions were frequently allowed to restrain proceedings at law by creditors.<sup>3</sup> And when the court, in such a suit, had taken the fund into its own hands, and had made a decree for the payment of debts, or a decree *quod computet*, it would restrain creditors of the estate from proceeding by actions at law against the executor.<sup>4</sup> So a judgment creditor of the deceased testator, with notice of such a decree, might be enjoined from proceeding under a judgment recovered by him against the testator, since such proceedings would withdraw the assets from the general fund which ought to be distributed among the creditors.<sup>5</sup> So, too, a legatee who had proven his demand

his death, creditors without judgment may maintain a bill to set aside a conveyance of his real estate made by the deceased in fraud of his creditors. Appeal of Fowler, 87 Pa. St., 449.

<sup>1</sup> Hubbard v. Hubbard, 14 Md., 356.

<sup>2</sup> Conolly v. Riley, 25 Md., 402.

<sup>3</sup> Martin v. Martin, 1 Ves. Sr., 211; Brooks v. Reynolds, 1 Bro. C. C., 183 and notes; Goate v. Fryer,

3 Bro. C. C., 24; S. C., 2 Cox, 201; Hardcastle v. Chettle, 4 Bro. C. C., 119; Paxton v. Douglas, 8 Ves., 520; Belmore v. Belmore, 12 Ir. Eq., 493; Molyneux v. Scott, 3 Ir. Ch., 291.

<sup>4</sup> Brooks v. Reynolds, 1 Bro. C. C., 183 and notes; Goate v. Fryer, 3 Bro. C. C., 24; S. C., 2 Cox, 201; Hardcastle v. Chettle, 4 Bro. C. C., 119.

<sup>5</sup> Belmore v. Belmore, 12 Ir. Eq., 493.

under the decree might be enjoined from afterward bringing an action at law against the executor to recover his legacy.<sup>1</sup> And it seems to have been a common practice to grant the injunction in such a case upon motion in the original suit in equity, and without a new action for that purpose.<sup>2</sup> Upon principles similar to those governing the jurisdiction as exercised in Great Britain, it is held in this country that where proceedings for the settlement of an insolvent estate are pending in the proper court of probate powers, which has full jurisdiction of the matter, the rights and equities of the creditors in the estate being equal, a creditor who subsequently obtains judgment at law upon his demand may be enjoined from enforcing his judgment, such a case plainly falling within the doctrine that equality is equity.<sup>3</sup>

§ 1409. While the practice was a common one in the English and Irish Courts of Chancery of thus restraining creditors from proceeding with suits against the representatives of a deceased person, after a decree to account in a creditor's suit for administration of assets, it was based upon the existence of a decree in equity which gave the creditor relief equivalent to that which he might obtain by his action at law. Unless, therefore, there was such an existing decree in equity in the same country, under which the creditor could prove his demand, the court of chancery would not deprive him by injunction of the ordinary remedy by action at law.<sup>4</sup> And while the court would enjoin creditors from proceeding at law against the estate of a deceased debtor when a decree had been made in a suit for the administration of his estate in equity, it would not enjoin a creditor from proceeding against the executors personally, if they had made themselves liable.<sup>5</sup>

§ 1410. Under the codes of procedure, which prevail in

<sup>1</sup> *Molyneux v. Scott*, 3 Ir. Ch., 291.

<sup>4</sup> *Browne v. Roberts*, I. R. 5 Eq., 540.

<sup>2</sup> *Paxton v. Douglas*, 8 Ves., 520.

<sup>5</sup> *Burles v. Popplewell*, 10 Sim., 383.

<sup>3</sup> *Scarlett v. Hicks*, 13 Fla., 314.

many of the states, supplemental proceedings have taken the place of the former creditor's bill in equity, which had its origin in the Court of Chancery of New York. And where the statute authorizes the court, in such proceedings, to forbid a transfer or other disposition of the debtor's property not exempt from execution, it is proper to enjoin the debtor in the first instance and summarily from disposing of his property, regardless of whether a receiver has been appointed in the cause. And the argument that such a summary power may be so exercised as to work great hardship to the debtor will not avail against the injunction, since he may prevent such hardship by paying the judgment.<sup>1</sup>

§ 1411. The creditors of an insolvent banking corporation, which has made a voluntary assignment for the benefit of its creditors, will not be enjoined at the suit of the assignee from taking proceedings for the enforcement of their demands when they have not accepted of such assignment.<sup>2</sup> Nor, upon the other hand, will the creditors in such case be allowed to enjoin the assignee from proceeding with the management of the estate when no allegation is made against his integrity, or solvency, or his fitness to administer the estate, and when no real danger to the assets is shown.<sup>3</sup> Creditors may, however, enjoin waste and mismanagement by the assignees of the debtor.<sup>4</sup> But a receiver of the property of a judgment debtor, appointed in a creditor's suit, who institutes an action for the recovery of property which had been assigned by the debtor under a voluntary assignment for the benefit of creditors, is not entitled in such action to a receiver of the property assigned and an injunction, when he fails to show that the assignment

<sup>1</sup> *In re Perry*, 30 Wis., 268.

<sup>2</sup> *Gresham, Assignee, v. Crossland*, 59 Ga., 270. See as to the right of a judgment creditor of an insolvent corporation to enjoin other creditors from proceeding at law, in an action for the appoint-

ment of a receiver to wind up such corporation under the laws of New York, *Hutchinson v. New York Central Mills*, 2 Ab. Pr., 394.

<sup>3</sup> *City Bank v. Crossland*, 59 Ga., 270.

<sup>4</sup> *Cohen v. Morris*, 70 Ga., 313.

was made to delay, hinder or defraud the creditors of the assignor.<sup>1</sup> And an assignee under a general assignment for the benefit of creditors can not enjoin a creditor residing in the same state from proceeding with an attachment suit against the property of the debtors in another state, the attachment having been instituted prior to the assignment and such creditor never having become a party to or participated in the benefits of the assignment.<sup>2</sup>

§ 1412. When there are conflicting claimants under various executions, a court of equity will not enjoin a sale of personal property under the executions, upon an allegation that the justice of the peace before whom the contest is pending has combined with some of the parties in interest to defeat plaintiff's right; since the court will not presume that the justice will administer the law improperly, and if he does, his errors should be corrected at law and not in equity.<sup>3</sup>

§ 1413. Where by agreement between several judgment creditors certain property of the debtor is sold, the proceeds of the sale to be applied in a particular manner in reduction of the indebtedness, a misappropriation of the fund thus received, to the prejudice of some of the creditors, would seem to afford sufficient ground to enjoin a further sale under execution by one of the creditors, until a final hearing.<sup>4</sup>

§ 1414. Where creditors, who sue in behalf of themselves and all others who shall become parties to the cause, seek to enjoin defendants from disposing of their property, and by agreement of the parties a preliminary injunction is granted as to part and refused as to part, creditors who subsequently come in and join in the proceeding will be held bound by such agreement, and will be denied an injunction as to the part before refused by agreement.<sup>5</sup>

<sup>1</sup> *Bostwick v. Elton*, 25 How. Pr.,

<sup>4</sup> *Phillips v. Walker*, 48 Ga., 55.

362.

<sup>5</sup> *Flannegan v. Hardeman*, 53

<sup>2</sup> *Jenks v. Ludden*, 34 Minn., 482. Ga., 440.

<sup>3</sup> *Endres v. Lloyd*, 56 Ga., 547.

§ 1415. Upon a bill by a principal against his agent for an accounting, an order enjoining the defendant absolutely from making any transfer or disposition of any real estate, stocks, bonds, or other securities, will not be sustained in the absence of any proof tracing the money of plaintiff into such property.<sup>1</sup>

<sup>1</sup> Ervin's Appeal, 82 Pa. St., 188.

## CHAPTER XXVIII.

### OF THE VIOLATION OF INJUNCTIONS.

I. EFFECT OF THE WRIT AND ITS VIOLATION . . . . .	§ 1416
II. WHAT CONSTITUTES A VIOLATION . . . . .	1432
III. REMEDY FOR VIOLATION . . . . .	1449

#### I. EFFECT OF THE WRIT AND ITS VIOLATION.

- § 1416. Injunction must be observed, however erroneous.
- 1417. Reason for the rule.
- 1418. Violation a contempt of court regardless of motive; motive considered in awarding punishment.
- 1419. Defendant's guilt must be clearly established.
- 1420. Advice of counsel no defense.
- 1421. Injunction becomes operative from the granting of the order.
- 1422. Defendant need not be officially apprised of writ; any actual notice sufficient to bind him.
- 1423. Illustrations of the rule.
- 1424. Notice by telegraph; injunction against corporation.
- 1425. Court must have jurisdiction.
- 1426. When attorneys guilty of contempt.
- 1427. The general doctrine illustrated.
- 1428. Receiver of railroad, when guilty of contempt.
- 1429. Compliance with order by plaintiff necessary.
- 1430. *Habeas corpus*.
- 1431. Doing act enjoined pending appeal.

§ 1416. The granting of injunctions being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed. With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed as long as it remains in existence, and the fact that it has been granted erroneously affords no

justification or excuse for its violation before it has been properly dissolved.<sup>1</sup> And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction.<sup>2</sup> So if defendant is in doubt as to the scope or extent of the injunction he should not wilfully disregard or violate it with a view of testing such questions, but should apply to the court for a modification or construction of its order.<sup>3</sup> And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the court will not, in such proceedings, consider whether the order was erroneous.<sup>4</sup>

§ 1417. The reason for the rule as here laid down is found in the necessity of preserving the respect and obedience due to the mandates of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom injunctions were issued to be themselves the judges of the propriety of the relief, or of the regularity of the proceedings. From the nature of the case, the tribu-

<sup>1</sup> *Moat v. Holbein*, 2 Edw. Ch., 188; *Partington v. Booth*, 3 Meriv., 148; *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121; *Woodward v. Earl of Lincoln*, 3 Swanst., 626; *People v. Sturtevant*, 9 N. Y., 263; *Sullivan v. Judah*, 4 Paige, 444; *Richards v. West*, 2 Green Ch., 456; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422; *Fleming v. Patterson*, 99 N. C., 404; *Billard v. Erhart*, 35 Kan., 616; *Central Union T. Co. v. State*, 110 Ind., 203. And see *Fennings v. Humphrey*, 4

*Beav.*, 1; *Blake v. Blake*, 7 Beav., 514; *Chuck v. Cremer*, 2 Ph., 113; *Erie Co. v. Ramsey*, 45 N. Y., 637, affirming *S. C.*, 3 Lans., 178; *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623; *State v. Harpers Ferry B. Co.*, 16 West Va., 864.

<sup>2</sup> *Richards v. West*, 2 Green Ch., 456; *Sullivan v. Judah*, 4 Paige, 444.

<sup>3</sup> *Wells v. Oregon R. & N. Co.*, 19 Fed. Rep., 20.

<sup>4</sup> *State v. Baldwin*, 57 Iowa, 266.

nal granting the relief must itself be the arbiter, and its mandates are to be strictly observed until properly revoked. And if the court granting the relief had jurisdiction of the subject-matter, the fact that its power was erroneously exercised does not render the injunction void, but only voidable, and until it is set aside or revoked it is entitled to implicit obedience.<sup>1</sup> And the fact that the injunction was too broad in its terms, and covered property over which it should not have been extended, affords no excuse for its violation.<sup>2</sup> Nor does the fact that the injunction was broader in its terms than the prayer of the bill warrant a defendant in disregarding it, since although irregular it is not void, and must be obeyed while in existence.<sup>3</sup> But, while a court may properly punish the violation of its injunction, although it was improperly awarded, it should not in such case compel the offender to pay to the plaintiff who obtained the injunction any sum as an indemnity, since the plaintiff was not entitled to the relief which he procured.<sup>4</sup>

§ 1418. The violation of an injunction constitutes a contempt of the court from which it issued, and will be punished accordingly.<sup>5</sup> Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation; on the contrary, it may be stated as a general rule, that where the writ has been duly served on defendants, they are liable for its violation, in whatever capacity or from whatever motive they may have acted.<sup>6</sup> But while, as we have seen in the preceding sections, the fact that an injunction was erroneously issued

<sup>1</sup> *People v. Sturtevant*, 9 N. Y., 263.

<sup>2</sup> *Richards v. West*, 2 Green Ch., 456.

<sup>3</sup> *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623.

<sup>4</sup> *Kaehler v. Dobberpuhl*, 56 Wis., 497; *Kaehler v. Halpin*, 59 Wis., 40.

<sup>5</sup> *People v. Sturtevant*, 9 N. Y.,

263; *Richards v. West*, 2 Green Ch., 456; *People v. Spalding*, 2 Paige, 326; *Commercial Bank v. Waters*, 10 Miss., 559; *Monroe v. Harkness*, 1 Cranch C. C., 157; *Same v. Bradley*, *Ib.*, 153; *Mead v. Norris*, 21 Wis., 310.

<sup>6</sup> *Quackenbush v. Vanriper*, 2 Green Ch., 350; *Wilcox S. P. Co. v. Schimmel*, 59 Mich., 524.



in the first instance affords no warrant or excuse to a defendant for a breach of its terms, yet such fact may properly be taken into consideration in awarding punishment for the breach.<sup>1</sup> Thus, where an injunction, irregularly and improperly issued in the first instance, has been violated by a defendant and his attorneys, the court may, on account of such irregularity, refuse to commit them for the breach, although requiring them to pay the costs thereby incurred, as well as the costs of the motion for commitment.<sup>2</sup> And it has even been held, where the injunction was broader in its terms than was contemplated by the bill, that on motion for an attachment for a violation the defendant should not be punished for disobeying so much of the writ as went further than the bill.<sup>3</sup> But a mere disclaimer by one who has violated an injunction of all intention to commit a contempt of court, when the contempt is of a constructive nature, will not necessarily purge him of contempt, although it may be considered with reference to the nature of the penalty to be imposed.<sup>4</sup>

§ 1419. Where proceedings in attachment are instituted to punish a defendant for breach of an injunction, the fact of his guilt must be clearly and explicitly established to the satisfaction of the court. But, while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted, and complainant failing to prove a violation of this to the satisfaction of the court, the rule for an attachment for contempt will be discharged.<sup>5</sup>

§ 1420. As regards the rights of persons affected by an injunction, the fact that defendant has violated the man-

<sup>1</sup> *Sullivan v. Judah*, 4 Paige, 444; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422.

<sup>2</sup> *Partington v. Booth*, 3 Meriv., 148.

<sup>3</sup> *Freeman v. Deming*, 4 Edw. Ch., 598.

<sup>4</sup> *Watson v. Citizens Savings Bank*, 5 S. C., 159.

<sup>5</sup> *Magennis v. Parkhurst*, 3 Green Ch., 433; *Probasco v. Probasco*, 3 Stew., 61. See also *Wisconsin C. R. Co. v. Smith*, 52 Wis., 140; *Smith v. Halkyard*, 19 Fed. Rep., 602.

date of the court under the advice of counsel constitutes no sufficient ground of defense in his favor. We have already seen that the motive with which the breach is committed constitutes no excuse for the wrongful act,<sup>1</sup> and equity will protect persons affected by the writ from any violation of its terms, even though committed under the sanction and advice of counsel.<sup>2</sup> Thus, where defendant has committed a breach of the injunction, he can not relieve himself from the responsibility for his conduct by the fact that it was committed under the advice of counsel that the service of the writ was defective, the officer not having exhibited the original writ, but only a copy thereof.<sup>3</sup> So where defendant, who has been served in person with a written notice that an order for an injunction against him has been made, proceeds with the commission of the acts enjoined, claiming to act under the advice of counsel that such notice was ineffectual to bind him, he is regarded as violating the injunction.<sup>4</sup> It is to be observed, however, that while the fact of defendant having committed the breach under the advice of counsel that he might safely disregard the writ affords no justification for his conduct, yet if such advice be given in good faith it may properly be taken into account in determining the degree of punishment to be inflicted for the breach, and may thus palliate, although it can not justify the violation.<sup>5</sup>

§ 1421. In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the

<sup>1</sup> *Quackenbush v. Vanriper*, 2 State v. Harpers Ferry B. Co., 16 Green Ch., 350. West Va., 864.

<sup>2</sup> *Mead v. Norris*, 21 Wis., 310; <sup>3</sup> *Mead v. Norris*, 21 Wis., 310.

*Hawley v. Bennett*, 4 Paige, 163; <sup>4</sup> *Kimpton v. Eve*, 2 Ves. & B., 849.

*McKillopp v. Taylor*, 10 C. E. <sup>5</sup> *Erie Co. v. Ramsey*, 45 N. Y., 637, affirming S. C., 3 Lans., 178. *Co. v. Johnson*, 35 N. J. Eq., 422; See also *Columbia Water Power Co. v. Columbia*, 4 S. C., 388; *Smith v. New York Consolidated Stage Co.*, 18 Ab. Pr., 429.

order being made, and not from the date of the writ itself, or from the time of its being drawn up.<sup>1</sup> The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation.<sup>2</sup> Thus, where an injunction is granted to restrain the commission of waste, and before the writ actually issues, or the order is drawn up, defendant is notified of the order, and its purport and effect are verbally explained to him, the cutting of timber after such notice constitutes a breach of the injunction.<sup>3</sup> So where an injunction is ordered against the commission of waste and the sale of crops, and the defendant is served with written notice thereof, but proceeds to sell in disregard of the notice, although admitting his belief that the order was made, he is guilty of a violation of the mandate of the court, even though he claims to have acted under the advice of counsel.<sup>4</sup>

<sup>1</sup> *McNeil v. Garratt*, 1 Cr. & Ph., 98; *James v. Downes*, 18 Ves., 522. And see *Hearn v. Tennant*, 14 Ves., 136.

<sup>2</sup> *Vansandau v. Rose*, 2 Jac. & W., 264; *United Telephone Co. v. Dale*, 25 Ch. D., 778. And see *Gooch v. Marshall*, 8 W. R., 410.

<sup>3</sup> *Vansandau v. Rose*, 2 Jac. & W., 264. And see *Gooch v. Marshall*, 8 W. R., 410.

<sup>4</sup> *Kimpton v. Eve*, 2 Ves. & B., 349. This was an injunction against the commission of waste and the sale of straw and standing crops, defendant having proceeded to a sale after personal service upon him of a written notice that an order for the writ was granted. Defendant, by his affidavit, admitted his belief that the order had been made, but claimed to have acted by the

advice of his solicitor, to the effect that a mere notice of the order had no binding force. Eldon, Lord Chancellor, observes: \* \* \* "It is true that before Lord Hardwicke's time, who first made the exception of the case of a party actually present in court, hearing the order made, actual service of the injunction was required. Lord Hardwicke, I suppose, felt the enormous mischief of permitting a man, hearing an order pronounced restraining him from doing an act, to walk out of court and immediately do that act, before service of the injunction. But if that extension of the practice was right, the court could not stop short, refusing to apply the principle in other cases affording the same necessity for its application. I have heard

§ 1422. Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined would seem sufficient to meet the requirements of the rule above laid down. And the courts have uniformly held that it is not requisite that a defendant, against whom an injunction has issued, should be officially apprised of its existence, or be served with process in the cause to render him liable for contempt in committing a breach of the injunction. If defendant is informed of the existence of the order, although not yet served with process, it becomes operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the writ, or of the order of the court that it should issue.<sup>1</sup> And one who has received notice of the order for an injunction may be guilty of a breach of the mandate of the court and may be punished for contempt, even though the writ has not yet issued. Otherwise, the opportunity would be afforded of committing with impunity violations of the injunction between the time of ordering the writ and the time of its issuing, and thus the very acts would be permitted which it is the object of the injunction to prevent.<sup>2</sup>

§ 1423. The rule as to defendant's liability for breach of an injunction upon notice of its existence, or of the order

some of my predecessors in this place treat as a great abuse of justice and want of consistency the refusal to apply that practice, which is applied to a person present in court and hearing the order, to a man standing outside of the court, and informed by some one who heard it that the order was pronounced." \* \* \* "In this case, the party admitting that he believed the order was made, the principle is the same as if his belief was formed from information short of actual service."

<sup>1</sup>*Hull v. Thomas*, 3 Edw. Ch., 236; *Howe v. Willard*, 40 Vt., 654; *Poertner v. Russell*, 33 Wis., 193; *Fleming v. Patterson*, 99 N. C., 404; *Farnsworth v. Fowler*, 1 Swan, 1; *Skip v. Harwood*, 3 Atk., 564; *Anon.*, *Ib.*, 567; *Powel v. Follet*, *Dick.*, 116. And see *Woodward v. King*, *Dick.*, 797; *Hearn v. Tenant*, 14 Ves., 136; *McNeil v. Garratt*, 1 Cr. & Ph., 98.

<sup>2</sup>*McNeil v. Garratt*, 1 Cr. & Ph., 98.

of the court, holds good even though there has been great negligence in serving the writ. And even where service has been delayed to such an extent as to constitute ground for a dissolution of the writ, he who violates it may still be attached for contempt.<sup>1</sup> So persons who remain in court during the argument of a motion for an injunction can not, by leaving the court just before the order for the writ is made, evade the consequences of a breach of the injunction; they having known that the writ was actually issued; and they will be punished for contempt for its violation, although they were not present when the order was actually pronounced.<sup>2</sup> And where one has not been officially apprised of the issuing of an injunction, but has been informed of it by one of the parties to the suit, he will nevertheless be guilty of a contempt should he violate the mandate of the court.<sup>3</sup>

§ 1424. Notice by telegraph of the granting of an injunction is also deemed sufficient to render the defendant liable for contempt in disregarding it, although not formally served with the writ. Thus, a sheriff who proceeds with a sale of property under execution, after having actual knowledge of the proceedings in bankruptcy by the judgment debtor, and being informed of the injunction by telegraphic dispatch, violates the injunction by proceeding with the sale.<sup>4</sup> So when counsel obtaining an injunction notifies defendants who are enjoined, by telegraph, of the granting of the writ and warns them that its violation will be a contempt of court, defendants will be deemed guilty of contempt if they violate the injunction.<sup>5</sup> So where an injunction issues against the president of a corporation, its officers and members, and is served upon the president in person, and is read aloud in the hearing of other officers

<sup>1</sup> *Howe v. Willard*, 40 Vt., 654.

<sup>2</sup> *Hearn v. Tennant*, 14 Ves., 136.

<sup>3</sup> *Hull v. Thomas*, 3 Edw. Ch., 110.  
236.

<sup>4</sup> *In re Bryant*, 4 Ch. D., 98. But see *Ex parte Langley*, 13 Ch. D.,

<sup>5</sup> *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422.

and members, who afterward proceed with the performance of the act enjoined, they are guilty of a contempt of court, although never served with process in the cause or with the order of injunction.<sup>1</sup> And an injunction against a municipal corporation binds its officers or persons acting for it, who have notice of the writ and of its contents, although not parties to the suit, and they may be punished for its violation.<sup>2</sup> But it has been held that service of an injunction upon defendant's clerk in court is not such service as to render defendant liable in proceedings for a violation of the injunction.<sup>3</sup>

§ 1425. While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court has jurisdiction over the subject-matter in controversy. And if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants can not, in such case, be punished for contempt for its alleged violation.<sup>4</sup> For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the mandate of the court is absolutely void.<sup>5</sup> So where a court has exceeded its powers

<sup>1</sup> *Rorke v. Russell*, 2 Lans., 242.

<sup>2</sup> *Phillips v. City of Detroit*, 2 Flippin, 92.

<sup>3</sup> *Gooseman v. Dann*, 10 Sim., 518. But it does not appear from the case as reported whether defendant had actual knowledge of the injunction.

<sup>4</sup> *Walton v. Develing*, 61 Ill., 201; *Darst v. The People*, 62 Ill., 306; *Andrews v. Knox Co.*, 70 Ill., 65;

*Dickey v. Reed*, 78 Ill., 261; *Ex parte Wimberly*, 57 Miss., 437.

<sup>5</sup> *Walton v. Develing*, 61 Ill., 201; *Darst v. The People*, 62 Ill., 306. In such case, it is said, when the law imposes an absolute duty upon a public officer and the court commands him not to perform that duty, he must obey the law and disobey the order of the court.

by granting an injunction in a matter over which it has no jurisdiction, as by enjoining a board of municipal officers from canvassing the returns of an election, the court having no power to hear or determine such controversies, its injunction will be treated as absolutely void, and a punishment inflicted for its violation will not be upheld.<sup>1</sup> And where the court granting the injunction is entirely without jurisdiction over the subject-matter, its judgment in imposing a fine in proceedings for contempt for disregarding the injunction will be reversed on appeal.<sup>2</sup>

§ 1426. While the attorneys in a cause in which an injunction is granted, if not named in the order, may not be technically liable for its breach, yet under their general duty and relation to the court they are chargeable as for a contempt if they co-operate with the parties to violate the injunction and advise its violation. And where, in an action against a banking corporation to wind up its affairs upon the ground of insolvency, the officers and agents of the bank are enjoined from paying out its funds, or disposing of any of its property and effects, it is a contempt of court for the attorneys of the bank to advise it to file a petition in bankruptcy. Such a contempt is not, however, of so grave a nature as to warrant a suspension or removal of the attorneys from the bar.<sup>3</sup> And where an attorney is acting for two different clients, one of whom is enjoined, and the other, who occupies a different position, having different rights and interests, is not enjoined, it would seem that the attorney is not guilty of a violation of the injunction in advising the client who is not enjoined.<sup>4</sup> But an attorney who appears for the defendants who are enjoined and argues a motion to dissolve, which is overruled, and who afterward proceeds to perform the act which has been enjoined, can not justify his conduct upon the ground that in

<sup>1</sup> Dickey v. Reed, 78 Ill., 261. But see, *contra*, People v. Dwyer, 90 N. Y., 402.

<sup>3</sup> Watson v. Citizens Savings Bank, 5 S. C., 159.

<sup>4</sup> People v. Randall, 73 N. Y., 416;

<sup>2</sup> Brewer v. Kidd, 23 Mich., 440. Slater v. Merritt, 75 N. Y., 268.

so doing he was acting as attorney for a third person not enjoined.<sup>1</sup>

§ 1427. It is not proper for a defendant who has been enjoined to experiment with a view of determining how near he may come to a violation of the injunction without actually violating it.<sup>2</sup> Nor can persons who are plainly guilty of violating an injunction excuse themselves upon proceedings for attachment upon the ground that it was commonly rumored that the injunction had been dissolved, nor can they justify themselves upon the ground that other persons were doing the act which had been enjoined.<sup>3</sup> Indeed, the courts exact a strict and implicit obedience to their injunctions, and will not permit them to be defeated by mere subterfuges on the part of those who are required to obey them. Thus, where a ferry company is enjoined from running a ferry, and the president of the company, for the purpose of evading the writ, conveys to himself individually a ferry-boat, and continues to run it in that way, he may be punished for contempt in violating the injunction.<sup>4</sup> But where an injunction was granted to restrain a board of county supervisors from erecting a jail, and the board proceeded to pass a resolution and to make a contract for building the jail, conditioned upon the dissolution of the injunction, such action was held not to be a contempt of court.<sup>5</sup>

§ 1428. When a railroad company is enjoined in a state court from obstructing the streets of a city with its cars, and the company afterward passes into the hands of receivers appointed by a federal court, the injunction becomes operative upon such receivers, and they may be punished for contempt in its violation. Nor does the fact of their removal from their office or trust afford any excuse for a

<sup>1</sup> *Wilcox S. P. Co. v. Schimmel*, 59 Mich., 524.

<sup>2</sup> *Craig v. Fisher*, 2 Sawy., 345.

<sup>3</sup> *Morris v. Hill*, 28 N. J. Eq. (1 Stew.), 33.

<sup>4</sup> *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623.

<sup>5</sup> *Andrews v. Knox Co.*, 70 Ill., 65.



violation of the injunction before such removal. Nor is one of such receivers exonerated from responsibility for having violated the injunction by the fact that he took no active part in the management of the road, since he can not relieve himself from responsibility by merely remaining inactive and permitting others to violate the injunction.<sup>1</sup>

§ 1429. The question whether a breach of an injunction has actually been committed has been held to be dependent upon whether plaintiff in the action has complied with the terms upon which the relief was ordered. Thus, where an order has been obtained granting an injunction in restraint of a sale under execution, upon the usual terms of giving a bond to defendant for the payment of damages incurred, it is held that proceedings under the execution are not stayed until the conditions are complied with. And in such case it is held to be no contempt of court to proceed with a sale under the execution, notwithstanding the chancellor's order was shown to the plaintiff in execution and to the sheriff.<sup>2</sup> But upon proceedings for contempt a defendant can not escape the liability for his disregard of the injunction upon the ground that the court may have granted it without requiring a bond.<sup>3</sup> And while the rule is well established that one who has actual notice of an order for an injunction may be held guilty of contempt for its disobedience, even before the order is formally drawn up, yet when it is ordered that the injunction issue upon filing the bill, such order is conditional in its nature, and there is no injunction and consequently no contempt until the bill has been filed.<sup>4</sup>

§ 1430. If the court or officer granting the injunction has jurisdiction to make the order, and defendant is attached for contempt for its violation, upon proceedings by *habeas corpus* to test the regularity of his imprisonment under such attachment, the court will not consider any question relat-

<sup>1</sup> Safford v. The People, 85 Ill., 558. Ohio St., 473; Forsythe v. Winans, 44 Ohio St., 277.

<sup>2</sup> Clarke v. Hoomes's Ex'rs, 2 Hen. & M., 23. See Diehl v. Friester, 37

<sup>3</sup> Young v. Rollins, 90 N. C., 125.

<sup>4</sup> Winslow v. Nayson, 113 Mass., 411.

ing to irregularities or omissions in the proceedings in which the injunction was granted. In such a case the only question to be considered is the question of jurisdiction of the officer by whom the injunction was granted, and that being clearly shown, defendant will not be permitted to avail himself of irregularities in the proceedings to procure his release from the attachment.<sup>1</sup>

§ 1431. An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt, notwithstanding such appeal.<sup>2</sup> But when an interlocutory injunction is granted upon the filing of the bill, but the bill is dismissed upon the hearing, and plaintiffs thereupon appeal, the appeal does not have the effect of reviving the injunction; and defendants are not, therefore, liable for contempt in doing the act which had been originally enjoined, pending such appeal.<sup>3</sup> Where, however, under the practice of the state an appeal lies from an order dissolving a temporary injunction, and the appeal upon the giving of a bond operates to suspend the order of dissolution and to leave the injunction in full force, the court which granted the injunction still retains such jurisdiction of the matter as to authorize it to punish for contempt in disregarding the injunction pending the appeal.<sup>4</sup> But where the court of appeals of the state has jurisdiction to grant a *supersedeas* to an order of an inferior court dissolving an injunction, and defendants, after the granting of such *supersedeas*, proceed to the commission of the act forbidden by the injunction, such action is a contempt of the court of appeals and may be punished upon proceedings in that court.<sup>5</sup>

<sup>1</sup> *In re Perry*, 30 Wis., 268.

<sup>2</sup> *Central Union T. Co. v. State*, 110 Ind., 203; *Heinlen v. Cross*, 63 Cal., 44. But see *Smith v. Western Union T. Co.*, 83 Ky., 269.

<sup>3</sup> *Brevoort v. Detroit*, 24 Mich., 322. As to the effect of the violation of an injunction, pending an appeal from a final judgment

granting the injunction, pending which appeal an order is granted staying proceedings under the judgment, see *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 71 N. Y., 430.

<sup>4</sup> *State v. Houston*, 37 La. An., 852.

<sup>5</sup> *State v. Harpers Ferry B. Co.*, 16 West Va., 864.

## II. WHAT CONSTITUTES A VIOLATION.

- § 1432. Injury to plaintiff's rights; creditors' suits.  
1433. Regard must be had to terms of writ.  
1434. Injunctions against proceedings at law.  
1435. Agents; stranger to cause; aiding another a violation.  
1436. Assignee of chose in action; suit by trustees; dissolution in part.  
1437. Breach need not be committed in person.  
1438. Permitting violation by others a contempt.  
1439. Disobedience under other authority not allowed.  
1440. Agents, servants and attorneys.  
1441. Violation by attorney.  
1442. Constructing railroad in violation of injunction.  
1443. Injunctions against corporations, municipal and private.  
1444. Defective service no excuse.  
1445. Right of way.  
1446. Spirit of injunction to be regarded.  
1447. Injunction not retroactive.  
1448. Purchase of patented article.

§ 1432. It is frequently a matter of difficulty to decide what constitutes such a breach of an injunction as to warrant proceedings against a defendant for contempt. It has been laid down as a general rule, subject, however, to some exceptions, that the offense complained of as a violation must be injurious to the rights of the complainant in the action.<sup>1</sup> And where, after service of an injunction upon defendant in a creditor's suit, he proceeds to judgment in an action previously begun against a third person, such conduct is not regarded as a breach of the mandate of the court, since it can work no injury to complainants in the injunction suit, and may benefit them.<sup>2</sup> So, too, where an injunction has been granted on a creditor's bill, the fact of the debtor afterward bringing suit against a third person for a tort, the tort consisting in taking property of the debtor under execution, which was exempt by law, consti-

<sup>1</sup> *Hudson v. Platts*, 11 Paige, 180.      <sup>2</sup> *Parker v. Wakeman*, 10 Paige, 485.  
And see *Parker v. Wakeman*, 10 Paige, 485.  
Paige, 485.

tutes no violation of the injunction.<sup>1</sup> Where, however, the judgment debtor is enjoined in a creditor's suit from making any transfer or disposition of his property, and he afterward gives to one of his creditors a draft upon third persons for an indebtedness due from them, the draft being given after the injunction, but in pursuance of an arrangement made before, the debtor is guilty of violating the mandate of the court.<sup>2</sup>

§ 1433. In determining whether an actual breach has been perpetrated, such as to warrant the court in committing for contempt, regard must be had to the terms of the injunction itself. And where the writ does not specifically restrain defendant from the commission of any definite act, but enjoins him in general terms from permitting certain injurious results to be produced by a particular cause, it must satisfactorily appear that the injurious result was actually produced by the given cause.<sup>3</sup> But where the mandate of the court has been violated in spirit as well as in letter, the court will not permit the general terms of the writ to be controlled or restricted by reference to the particular nature of the grievance.<sup>4</sup> Nor will the court permit defendants to evade responsibility for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing.<sup>5</sup> And when the order is a continuing one, being in the nature of a mandatory injunction commanding the performance of certain acts, its violation may be punished as a contempt.<sup>6</sup>

§ 1434. Where an injunction has been granted to stay proceedings in an action at law, the mere delivery of a declaration has been deemed a violation of the writ.<sup>7</sup> And

<sup>1</sup> *Hudson v. Plets*, 11 Paige, 180.

<sup>2</sup> *In re Perry*, 30 Wis., 268. See also *Jewett v. Bowman*, 12 C. E. Green, 171.

<sup>3</sup> *Dawson v. Paver*, 5 Hare, 415.

<sup>4</sup> *Attorney-General v. Great*

*Northern R. Co.*, 4 DeGex & Sm., 75.

<sup>5</sup> *Gibbs v. Morgan*, 39 N. J. Eq., 79.

<sup>6</sup> *State v. Baldwin*, 57 Iowa, 266.

<sup>7</sup> *Mills v. Cobby*, 1 Meriv., 8.

the service of a trial notice in the action enjoined,<sup>1</sup> or obtaining a change of venue,<sup>2</sup> is a breach of the mandate of the court. And when an injunction has been granted to stay proceedings after judgment, the taking out of execution upon the judgment is a contempt of court.<sup>3</sup> So where an injunction has been obtained against execution under a judgment, the taking of any steps toward execution beyond the completion of the judgment is a violation of the injunction.<sup>4</sup> So, too, it has been held to be a violation of an injunction against proceedings at law to place in the hands of the sheriff an attachment for non-payment of costs, even though the costs in question were actually taxed before the writ was allowed.<sup>5</sup> And where, before the issuing of an injunction against proceedings at law, legal process had been placed in the hands of the sheriff, and the plaintiff in the action at law did not stop the process on being applied to by the sheriff for further instructions, his neglect to countermand the writ was held to be a contempt.<sup>6</sup> But in an early English case, where an injunction was had to restrain proceedings after judgment, with leave to proceed to judgment, it was held that the taking out of a *scire facias* after judgment, in order to an inquiry of assets, was not a violation of the injunction, since the plaintiff should be allowed to proceed so far that he might be at liberty, *eo instanti*, upon the dissolution of the injunction, to take out execution.<sup>7</sup> And an injunction against the prosecution of an action at law is not violated by issuing an execution for costs due in such action, the collection of which has not been enjoined.<sup>8</sup> But the dismissal of one of several actions which have been enjoined and the subsequent bringing of

<sup>1</sup> Clark v. Wood, 2 Halst. Ch., 458; Bird v. Brancker, 2 Sim. & St., 186.

<sup>2</sup> Pariente v. Bensusan, 13 Sim., 522.

<sup>3</sup> Hereford v. Carpenter, Toth., 113.

<sup>4</sup> Bullen v. Ovey, 16 Ves., 141.

<sup>5</sup> Partington v. Booth, 3 Meriv., 148.

<sup>6</sup> Woodley v. Boddington, 9 Sim., 214.

<sup>7</sup> Morrice v. Hankey, 3 P. Wms.,

146.

<sup>8</sup> German Savings Bank v. Habel, 80 N. Y., 273.

another suit for the same demand will be treated as a violation of the injunction and as a contempt of court.<sup>1</sup>

§ 1435. While it would seem that the agents of one against whom an injunction is awarded, having knowledge of the order may be held liable for acts committed in violation of its terms,<sup>2</sup> yet one who was not a party to the proceedings, and who has acquired no rights from any of the parties *pendente lite*, is not guilty of a breach of the injunction by exercising a right which belonged to him before the suit.<sup>3</sup> So a stranger to the cause, who is unconnected with the parties defendant, will not be punished for doing the act prohibited by the injunction.<sup>4</sup> But a breach amounting to a contempt may be committed, even by aiding one who acts in an official capacity and under authority of law. Thus, where an injunction is granted to quiet possession, defendant who assists a justice of the peace in making restitution upon a forcible entry thereby commits a breach.<sup>5</sup>

§ 1436. The assignee of a chose in action who, after the dissolution of an injunction against himself, institutes proceedings at law relative to the matter concerning which he was enjoined, is not guilty of a violation of the injunction, although it has not been dissolved as against his assignor.<sup>6</sup> Nor is the institution of an action at law by trustees to recover possession of trust property a breach of an injunction which has been granted to prevent their selling such property, since the assertion of the legal title by the trustees may be necessary for the protection of the rights of all parties in interest.<sup>7</sup> But where three plaintiffs at law have been enjoined from proceeding with an action, and a dissolution is afterward allowed as against two of the plaintiffs, it is held to be a violation for the three afterward to pro-

<sup>1</sup> *In re Schwarz*, 14 Féd. Rep., 787.

<sup>2</sup> *Wellesley v. Mornington*, 11 Beav., 181.

<sup>3</sup> *Bootle v. Stanley*, 2 Eq. Ca. Ab., 528.

<sup>4</sup> *Boyd v. State*, 19 Neb., 128.

<sup>5</sup> *Woodward v. Earl of Lincoln*, 3 Swanst., 626.

<sup>6</sup> *Imperial Gas Light Co. v. Clarke*, 1 Younge, 580.

<sup>7</sup> *Nichols v. Campbell*, 10 Grat., 560.

ceed with the action; although if the injunction has been dissolved generally, and not merely as against the two, it is not a violation if the two should carry on the proceedings in the name of the three.<sup>1</sup>

§ 1437. To render one liable for a violation of an injunction, it is not necessary that he should have actually committed the breach in person, and one who is present, aiding and abetting in the commission of the act, or who permits it to be done in his presence, and without remonstrance, is himself guilty of an actual breach of the injunction, and will be punished accordingly.<sup>2</sup> Thus, an attaching creditor who has been restrained from selling the property attached, violates the writ if he allows the attaching officer to sell in his presence without remonstrance, the officer being regarded as his agent for the purposes of the sale.<sup>3</sup> And one who quietly stands by and permits an injunction to be violated is guilty of a contempt, no matter how unreasonable the provisions of the writ may have been.<sup>4</sup> If, however, complainant, at whose instance an injunction has been granted, himself consents to its violation he is estopped from afterward having defendant punished for such violation.<sup>5</sup>

§ 1438. It is the clear duty of one who is enjoined from the commission of a particular act not only to refrain from doing the act in person, but also to restrain his employes from doing the thing forbidden, and a mere passive and personal obedience to the order will not suffice. And when, by his own negligence and inattention, one who has been enjoined permits his agents, partners and employes to do the prohibited act, he may be punished for contempt in disregarding the injunction.<sup>6</sup>

§ 1439. Defendants who are enjoined from doing a par-

<sup>1</sup> *Money v. Jordan*, 13 Beav., 229.

<sup>2</sup> *St. John's College v. Carter*, 4 Myl. & Cr., 497; *Blood v. Martin*, 21 Ga., 127; *Phillips v. City of Detroit*, 2 Flippin, 92.

<sup>3</sup> *Blood v. Martin*, 21 Ga., 127.

<sup>4</sup> *Stimpson v. Putnam*, 41 Vt., 238.

<sup>5</sup> *Howard v. Durand*, 36 Ga., 346.

<sup>6</sup> *Poertner v. Russell*, 33 Wis., 193.

ticular act will not be permitted under authority from another tribunal or body to do the act in question, pending such injunction, and will be guilty of a contempt of court if they thus violate the injunction, it being their clear duty to obey it until it is dissolved by the same authority by which it was granted.<sup>1</sup>

§ 1440. The obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them.<sup>2</sup> Thus, where the writ is simply directed to a defendant, without including his agents or servants, an agent will not be punished for a breach.<sup>3</sup> Nor will a person be punished for contempt because of the violation of an injunction by his servants, he himself being free from all blame in person. But defendant may, in such case, be held liable for the costs of the proceedings to commit for the breach.<sup>4</sup> And where defendant's attorney has been enjoined from proceeding at law, it has been held a breach of the injunction for the defendant himself to proceed.<sup>5</sup> So an injunction which runs against a defendant, his agents and employes, is binding upon his attorney who was present in court when the order was granted and he may be held responsible for its violation. Nor can he justify his conduct upon the ground that he was afterward retained by and acting for other parties in doing the act in question.<sup>6</sup> But where the writ restrains a person and his agents or servants, his tenants are not regarded as included in the prohibition.<sup>7</sup>

<sup>1</sup> *Muller v. Henry*, 5 Sawy., 465.  
See also *Williamson v. Carnan*, 1 Gill & J., 184.

<sup>2</sup> *Iveson v. Harris*, 7 Ves., 256;  
*Wellesley v. Mornington*, 11 Beav., 181.

<sup>3</sup> *Wellesley v. Mornington*, 11 Beav., 181.

<sup>4</sup> *Rantzen v. Rothschild*, 14 W. R., 96.

<sup>5</sup> *Sedgwick v. Redman*, Cary, 44.

<sup>6</sup> *Wimpy v. Phinzy*, 68 Ga., 188.

<sup>7</sup> *Lodson v. Coppard*, 29 Beav., 4.

As to the liability of a landlord of premises for violation of an injunction restraining their use for saloon purposes, see *Koester v. State*, 36 Kan., 27.



§ 1441. When an attorney is enjoined from further proceedings in an action begun by him for the appointment of a receiver, and the injunction is served upon him while he is actually engaged in making his application for a receiver before the court in which such cause is pending, and when informed of the injunction the attorney states to the court that he is enjoined from further proceedings, and then delivers to the court his motion papers with a draft order for the appointment of the receiver, he is guilty of a plain contempt of court.<sup>1</sup> And where persons having a right of action in either the state or the United States courts elect to bring their action in the former, and are there enjoined from further proceedings until certain assets are marshaled, it is a contempt of court to bring their action in the United States courts, pending such injunction, and the attorneys may be punished for thus violating the mandate of the state court.<sup>2</sup>

§ 1442. Where an injunction is granted against a railway company, its agents and any one acting under its authority or in its behalf, restraining it from constructing its road through a particular farm, and the president of the company afterward becomes a party to the suit upon his own motion, and the road is constructed through the land in question with his approval and under his order and direction, he will be liable in a proceeding for contempt for its violation, although not personally named in the writ.<sup>3</sup>

§ 1443. Since an injunction granted against a corporation is binding upon all persons acting for or in behalf of the corporation who are apprised of the writ, it follows that all members of the corporation upon whom service is had are liable for a breach of the injunction. And the passage of a resolution by the common council of a city, granting a right which they are forbidden by injunction to grant, is a violation of the writ, although the terms of the resolution are not accepted by the person to whom the

<sup>1</sup> *In re South Side R. Co.*, 10 Bank. Reg., 274.

<sup>2</sup> *Hines v. Rawson*, 40 Ga., 356.

<sup>3</sup> *State v. Cutler*, 13 Kan., 181.

right is granted.<sup>1</sup> So the chief engineer of a steamboat, owned by a foreign corporation and running between two ports of different states, is liable for the violation of an injunction restraining the use of certain machinery upon the boat; and it is no excuse for him to say, he being a defendant in the injunction suit, that he was a mere agent of the corporation.<sup>2</sup> And an injunction against a corporation and its agents binds its officers as well; nor can the president of the corporation, by resigning his office and selling his shares of stock, be permitted to do the act which has been enjoined.<sup>3</sup> So when the trustees of a society or corporation are restrained from doing a particular thing, and afterward resign, and their successors are elected and, with full knowledge of the injunction, such successors do the act in question, they are guilty of contempt and will be punished accordingly.<sup>4</sup> But when a corporation is enjoined its officers, who have themselves done nothing toward violating the injunction and who have taken all reasonable steps in their power to prevent its violation, will not be held responsible for the acts of other parties in disregard of the injunction.<sup>5</sup> And a municipal corporation as such can not be held guilty of contempt in violating an injunction, but only the persons or officers who have disobeyed the writ.<sup>6</sup>

§ 1444. A defect in the service of the writ affords no excuse for its violation, and one may be guilty of contempt in disobeying an injunction, notwithstanding defective service by the officer to whom it was entrusted. It is sufficient for the court to know that the person enjoined had actual knowledge of its order.<sup>7</sup> And an officer who, with due notice of an injunction against the sale of certain property under execution, nevertheless proceeds with the sale, be-

<sup>1</sup> *People v. Sturtevant*, 9 N. Y., 263.

<sup>2</sup> *Sickles v. Borden*, 4 Blatch., 14.

<sup>3</sup> *Morton v. Superior Court*, 65 Cal., 496.

<sup>4</sup> *Avery v. Andrews*, 51 L. J. R. N. S. Ch., 414.

<sup>5</sup> *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq., 411.

<sup>6</sup> *Bass v. City of Shakopee*, 27 Minn., 250.

<sup>7</sup> *Mead v. Norris*, 21 Wis., 310.

comes a trespasser *ab initio*, even though the property may have been levied upon before the injunction was granted.<sup>1</sup>

§ 1445. Nothing will be deemed a violation of an injunction forbidding the disturbance of a particular right of way, which does not interfere with the free exercise of the right or easement. Thus, where there are several distinct but intimately connected rights, such as a right of way and a right of soil, an injunction having been granted for the preservation of one of them, a fair exercise of the other right will not be deemed a violation of the writ as to the first, if it leaves as large a scope for its exercise as before.<sup>2</sup>

§ 1446. In deciding whether there has been an actual breach of an injunction it is important to observe the objects for which the relief was granted, as well as the circumstances attending it.<sup>3</sup> And it is to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. Thus, where an injunction has been granted restraining a defendant and his servants and agents from obstructing and impeding the passage of canal boats, the bringing of fifteen actions of trespass against the canal company on account of the passage of that number of barges along that part of the canal flowing over the land in controversy, is a violation of the spirit of the injunction, and will be restrained.<sup>4</sup> Upon the other hand, when the conduct complained of, although literally a breach of the injunction, is not so in spirit, and when defendants have acted in good faith, and there is no evidence of any intention on their part to violate the writ, they will not be held guilty of a contempt of court.<sup>5</sup>

§ 1447. An injunction is not retroactive in effect, and a

<sup>1</sup> *Turner v. Gatewood*, 8 B. Mon., 613.

<sup>2</sup> *Bosley v. Susquehanna Canal*, 3 Bland, 63.

<sup>3</sup> *Loder v. Arnold*, 15 Jur., 117; *Campbell v. Tarbell*, 55 Vt., 455.

<sup>4</sup> *Grand Junction Canal Co. v. Dimes*, 17 Sim., 38.

<sup>5</sup> *Fraas v. Barlement*, 10 C. E. Green, 84.

person who has been enjoined will not be held liable for contempt for the doing of any act before suit brought or injunction granted.<sup>1</sup> And where a railway company was enjoined from taking up or removing or disposing of the iron forming its track, but before the granting of the injunction or the institution of the cause the company had sold the iron to third persons, the omission of the company to prevent such purchasers from removing the iron was held not to constitute a violation of the injunction.<sup>2</sup> So where the writ was granted in a mandatory form, commanding defendants to deposit certain bonds with the state treasurer, and enjoining them from delivering the bonds or putting them in circulation, but before defendants were served with process in the action the bonds had been removed to a bank in another state where they still were, and it was impossible for defendants to obtain possession of them so as to comply with the mandate of the court, it was held that defendants were properly discharged from proceedings in attachment for the alleged contempt.<sup>3</sup> But where a defendant is enjoined from disposing of certain property, it is not a sufficient excuse upon proceedings against him for contempt in violating the injunction that he delivered the property in pursuance of a sale made before the injunction was allowed.<sup>4</sup> Where, however, part of the injury complained of has already been done by defendant before the injunction issues, but after the writ is allowed he does acts in furtherance of such injury, he can not protect himself from the consequences of a violation by the fact that the injunction did not in terms prohibit the act which he committed, and he will, accordingly, be held guilty of a contempt.<sup>5</sup>

<sup>1</sup> *People v. Albany & V. R. Co.*, 12 Ab. Pr., 171; *Witter v. Lyon*, 34 Wis., 564.      *Green*, 171. See also *In re Perry*, 30 Wis., 268.

<sup>2</sup> *People v. Albany & V. R. Co.*, 12 Ab. Pr., 171.

<sup>3</sup> *Witter v. Lyon*, 34 Wis., 564.

<sup>4</sup> *Jewett v. Bowman*, 12 C. E.

<sup>5</sup> *Thropp v. Field*, 10 C. E. *Green*, 166. But where the Supreme Court of the state had awarded a peremptory writ of *mandamus*, and an injunction was afterward obtained

§ 1448. Where an injunction had been obtained against the use of a patented article, and plaintiffs, desiring to know whether defendant was still using the article in violation of the injunction, procured another person to apply to defendant for the purchase of one of the manufactured articles, in an action brought by defendant in the injunction suit for a conspiracy to procure him to violate the injunction and to subject him to costs and damages, it was held that the patentees might rightfully resort to that method of determining whether the injunction was being violated.<sup>1</sup> And a defendant, who has been enjoined from selling certain articles as an infringement upon plaintiffs' patent, violates the injunction by selling beyond the territorial jurisdiction of the court, whether the articles are or are not sent within its jurisdiction.<sup>2</sup>

in an inferior court restraining the enforcement of the judgment in the *mandamus* proceeding upon grounds alleged to have arisen after the rendition of such judgment, the Supreme Court refused to punish such proceedings as a contempt of court. *Villavas v. Walker*, 24 La. An., 213.

<sup>1</sup> *Knowles v. Peck*, 42 Conn., 386.

<sup>2</sup> *Macaulay v. White S. M. Co.*, 9 Fed. Rep., 698.

## III. REMEDY FOR VIOLATION.

- § 1449. Attachment for contempt; governing considerations; violation not considered in collateral suit.
1450. Plaintiff's conduct; laches; acquiescence.
1451. Delay in obtaining service.
1452. Practice in proving violation.
1453. Removal of cause to United States courts.
1454. Procedure in United States courts.
1455. Proofs in attachment proceedings.
1456. Mitigating circumstances.
1457. Extent of fine imposed.
1458. Appellate court averse to interfering with punishment.
1459. Evidence on hearing.
1460. Corporation may be punished.
1461. Attachment not the only punishment.
1462. Impropriety of injunction considered in fixing punishment; proceedings after dissolution.
1463. Levy of execution; statutory franchise.
1464. Party in contempt not allowed hearing on motion to dissolve.
1465. Patent right; costs.
1466. Judgment of contempt not appealable in Wisconsin.

§ 1449. The usual remedy for breach of injunction is by proceedings against the offending party for an attachment for contempt of court.<sup>1</sup> And in taking steps to punish such

<sup>1</sup> *Monroe v. Harkness*, 1 Cranch C. C., 157; *Monroe v. Bradley*, Ib., 158. The remedy by attachment was adopted by the English Court of Chancery at an early day for the punishment of violations of injunctions. A curious and instructive case is *Allen v. Dingley*, Choyce Cases in Chancery, 113, reported as follows: "Forasmuch as Mr. Dr. Yale, one of the masters of this court, to whom the consideration of a contempt in the breach of an injunction was committed by Master Sergeant Powtrel was referred, hath made report that the said Sergeant Powtrel after the open publishing of the same injunction, and

after perfect knowledge thereof, did move at the King's Bench Barre for judgment for the defendant, iterating his motion for the same, which he did after the sight of the said injunction. Therefore, the said Mr. Sergeant Powtrel being this present day called into this court is openly enjoined in the sum of one hundred pounds, not to depart out of the Town until he shall be licensed thereunto by the Right Honorable the Lord Keeper of the Great Seal of England. Allen plaintiff, Dingley defendant. Anno 19 Eliz. The like order was made the same term against Master Robert Snagg for moving for the de-

contempt the court will not inquire into the merits of the cause in which the writ was issued, the only question for determination being whether the mandate of the court has been violated.<sup>1</sup> An order of commitment for breach of an injunction being *strictissimi juris*, it will not be granted except upon a clear and satisfactory showing of an actual violation.<sup>2</sup> The proceedings are *quasi* criminal in their nature, and may, it would seem, be brought in behalf of the people, although not necessarily conducted by counsel for the government.<sup>3</sup> And a person applying to a court of equity for the punishment of a party guilty of a breach of injunction must show that he has some interest in the subject-matter of the controversy which gave rise to the injunction.<sup>4</sup> But although the violation of an injunction is a contempt of the court by which it was granted, a court of law can not take cognizance of such violation in another action, nor will such violation be allowed to operate in a collateral proceeding as a forfeiture of legal rights when it is not shown that it has been perpetuated by a final decree.<sup>5</sup>

§ 1450. The conduct of the party obtaining the injunction, as well as the motive of defendant in violating it, may properly be taken into account in determining defendant's liability for the breach.<sup>6</sup> And where an injunction is granted before proceedings at law, staying all proceedings, and defendant in the injunction suit afterward institutes an action in ejectment, to which complainant pleads, and

defendant in the King's Bench in the same cause."

<sup>1</sup> *People v. Spalding*, 2 Paige, 326. See also *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121.

<sup>2</sup> *Mann v. Stephens*, 15 Sim., 377; *Grand Junction Canal Co. v. Dimes*, 17 Sim., 38; *Worcester v. Truman*, 1 McLean, 483.

<sup>3</sup> *Worcester v. Truman*, 1 McLean, 483; *Crook v. The People*, 16 Ill., 534, and cases cited.

<sup>4</sup> *Hawley v. Bennett*, 4 Paige,

163; *Secor v. Singleton*, 35 Fed. Rep., 376.

<sup>5</sup> *Callan v. McDaniel*, 72 Ala., 96.

<sup>6</sup> *Mills v. Cobby*, 1 Meriv., 3; *Barfield v. Nicholson*, 2 L. J. Ch., 90. As to the liability of a plaintiff who has procured an injunction to preserve the *status quo* as to the property in controversy, for disregarding his own injunction by doing the acts which defendant is enjoined from doing, see *Varizandt v. Argentine M. Co.*, 2 McCrary, 642.

suffers two months to elapse before taking any steps toward punishing the breach, the court will refuse to punish for contempt.<sup>1</sup> And where the person obtaining the writ misrepresents the action of the court to the public, and defendant, in endeavoring to correct such misrepresentation, commits a technical violation of the injunction, proceedings against him for contempt by the complainant will not be entertained.<sup>2</sup> But to deprive a party obtaining the writ of the right to move for a committal for its breach, on the ground of his acquiescence therein, a strong showing of acquiescence must be made out. Thus, where a defendant seeks to evade his liability for breach of an injunction restraining him from the use of complainant's trade mark, upon the ground of acquiescence, he must show such a degree of acquiescence as would suffice to create a new right in himself.<sup>3</sup>

§ 1451. While, as we have already seen, the doctrine is well established, that to render a defendant liable for violating an injunction it is only necessary that he should have been in any manner apprised of its existence, although not actually served with the writ,<sup>4</sup> yet complainant's laches in obtaining service may be taken into account upon a motion to commit for a breach. Thus, where complainant has suffered a period of four months to elapse, after the granting of the order, before getting it drawn up and served, although defendant may be in contempt, having been pres-

<sup>1</sup> *Mills v. Cobby*, 1 Meriv., 3.

<sup>2</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90.

<sup>3</sup> *Rodgers v. Nowill*, 3 DeGex, M. & G., 614. The degree of acquiescence required to justify defendant is stated by Lord Justice Turner, as follows: "Then on the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who

has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create a new right in him."

<sup>4</sup> See § 1422, *ante*.



ent in court on the hearing of the motion for the injunction, yet a motion to commit under such circumstances will be refused with costs.<sup>1</sup>

§ 1452. In proceedings for contempt for the violation of an injunction, the usual method of proving the fact of violation is by affidavit.<sup>2</sup> It is not necessary that the matter alleged as the foundation for the charge of contempt should appear in the rule to show cause why defendant should not be attached, the rule to show cause serving merely as a process.<sup>3</sup> But it is usually requisite that service of the writ of injunction should be shown, since without such service or notice of the injunction there can be no vio-

<sup>1</sup>James v. Downes, 18 Ves., 522. "A party can not," observes Lord Eldon, "be committed for the breach of an injunction, that express species of contempt, unless there is an injunction. On the other hand, if he was present when the order was made, the court will not permit him to elude its justice by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt; but there is no instance, previous to the case of Hearn v. Tennant (14 Ves., 136), that the court ventured to consider the act of contempt, unless the party, being present in court, heard the order for an injunction made. My opinion on that occasion was, and still is, that if the party was in court while the motion was proceeding, he should not, by turning his back before the court pronounced the order 'let the injunction go,' escape the process, considering it a mere contrivance; but the court can never intend that the plaintiff, having obtained the order granting the injunction, is to lie by four months as if it had not

been granted. The court, interposing to assist the plaintiff and prevent his losing the benefit of the process, while he is actually pursuing it, can not consider him entitled under the order for three or four months together. Therefore dismiss this motion with costs." But see United Telephone Co. v. Dale, 25 Ch. D., 778.

<sup>2</sup>State v. Myers, 44 Iowa, 580. In Kansas, under the constitution and laws of the state, an injunction may be granted by a judge at chambers, and a proceeding for contempt for its violation may also be had at chambers. And when such proceeding is heard by the judge at chambers and no jury is asked for and no objection is taken to the hearing without a jury, it will not be held error on review by the supreme court. And the proceeding for contempt being a summary one, it may be heard upon the original affidavit filed in the proceeding, and without formal pleadings. State v. Cutler, 13 Kan., 131.

<sup>3</sup>Columbia Water Power Co. v. Columbia, 4 S. C., 388.

lation, and the attachment proceedings may be dismissed or an attachment refused for want of such proof.<sup>1</sup> If, however, defendant is thus discharged from the attachment for want of affidavit of service of the injunction, such discharge does not operate as a hearing upon the merits, and constitutes no bar to a subsequent attachment for the same alleged contempt.<sup>2</sup> And the breach of an injunction being in the nature of a tort, it constitutes no valid objection to proceedings for a committal that plaintiff has moved against but one of the defendants.<sup>3</sup>

§ 1453. Under the former statute of the United States concerning the removal of causes from the state to the federal courts, it was held that the latter could not punish for the violation of an injunction which had been granted in the cause by the state court before removal, since the removal operated *ipso facto* as a dissolution of the injunction.<sup>4</sup> But since, under the removal act of March 3, 1875, it is expressly provided that any injunction granted before the removal, against a defendant applying for such removal, shall continue in force until modified or dissolved by the United States court,<sup>5</sup> no reason is perceived why the latter tribunal should not punish for a violation of the injunction committed after the removal into that forum.

§ 1454. The proper method of procedure for the punishment of a breach of injunction, in the courts of the United States, is by motion that the defendant stand committed for the violation, and he must be served with due notice of this motion. The object of the proceeding is the enforcement of obedience to the mandates of the court by punishing any intentional violation of its process. The mode of relief being summary and rigorous, he who invokes the aid of equity for the punishment of a violation of injunction is required to show the allowance of the writ

<sup>1</sup> State v. Gilpin, 1 Del. Ch., 25;  
Whipple v. Hutchinson, 4 Blatch.,  
190.

<sup>3</sup> Newman v. Ring, 10 Jur., 463.  
<sup>4</sup> McLeod v. Duncan, 5 McLean,  
343.

<sup>2</sup> State v. Gilpin, 1 Del. Ch., 25.

<sup>5</sup> U. S. Revised Statutes, § 646.

upon the conditions imposed by the court, that it has been duly served, and that defendant has been notified of the time and place of the motion.<sup>1</sup>

§ 1455. It is incumbent upon complainant, in moving an attachment against a defendant for contempt of court in disobeying an injunction, to state in the proofs upon which the application is founded the specific acts of omission, or of commission, which constitute the alleged contempt.<sup>2</sup> And in proceedings for contempt proofs are properly admissible to contradict the answer of the defendant to the interrogatories propounded to him.<sup>3</sup> And it is competent for a defendant charged with a breach, as in the case of an injunction against the infringement of a patent, to show his compliance with the writ while it remained in force, and that it carried on its face the period of its duration, which having expired, he could not be guilty of a breach.<sup>4</sup>

§ 1456. If a defendant, who has been guilty of a contempt of court in violating its injunction, voluntarily and promptly submits himself to the jurisdiction of the court upon proceedings in attachment, and frankly and fully answers all interrogatories propounded to him in such pro-

<sup>1</sup> *Worcester v. Truman*, 1 McLean, 483. The nature of the proceedings for the punishment of a violation of injunction, and the conditions requisite to the exercise of this summary jurisdiction of courts of equity in enforcing obedience to their mandates, are well laid down by McLean, J., in this case, as follows: "This, although in the nature of a criminal proceeding, is not, in fact, strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not necessarily by the attorney for the government. The object of the proceeding is to enforce obedience to the process of the court by punishing an intentional disregard of it. The mode is summary

and rigorous, and the party who thus invokes the aid of the court should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow. He must show the allowance of the injunction, that it has been issued on the terms specified and within the limits imposed, that it has been duly served, and that notice has been given to the defendant of the time and place of the motion, 'that he stand committed for a breach of the injunction.' "

<sup>2</sup> *Parkhurst v. Kinsman*, 2 Blatch., 76.

<sup>3</sup> *Crook v. The People*, 16 Ill., 534.

<sup>4</sup> *Daw v. Eley*, L. R. 3 Eq., 496.

ceedings, while such conduct can not excuse or justify the contempt, it would seem to be proper to consider it as a mitigating circumstance in fixing the punishment.<sup>1</sup> And where defendants, upon a rule to show cause why they should not be attached for contempt, disclaim all intention of violating the injunction, and plaintiffs only seek a determination of the court as to the duty of defendants, rather than a punishment for contempt, it is proper to discharge the rule to show cause.<sup>2</sup>

§ 1457. Where a defendant, against whom proceedings are had by attachment for violating an injunction, shows that he did not know the nature of the process and that he ceased to do the act enjoined as soon as he could take the advice of counsel, it was regarded as sufficient punishment to require him to pay the costs of the motions for the injunction and for its dissolution, and of the motion for an attachment.<sup>3</sup> So where defendant has violated an injunction, but acting under competent advice and with no intention of disobeying the order of the court, it is proper to require him to pay the costs of the attachment proceedings, without imposing any fine.<sup>4</sup> And it is a proper punishment to require a party who has violated an injunction to pay the actual damages which have been sustained by the plaintiff by reason of such violation, with the costs of the proceedings for contempt.<sup>5</sup> But where there had been a clear and wilful violation of the injunction, it was held proper to punish by a fine of the amount of the taxed costs and solicitor's and counsel fees incurred by defendant's resistance to the proceedings for attachment and in the proceedings for the taking of testimony as to violation, the defendant to stand committed until payment of such fine.<sup>6</sup> It is, however, improper to divide the fine imposed between the

<sup>1</sup> *State v. Eddy*, 2 Del. Ch., 269.

<sup>4</sup> *Carstaedt v. U. S. Corset Co.*,

<sup>2</sup> *Longwood V. R. Co. v. Baker*,

13 Blatch., 371.

12 C. E. Green, 166.

<sup>5</sup> *Chapel v. Hull*, 60 Mich., 167.

<sup>3</sup> *Bradford v. Peckham*, 9 R. I.,  
250.

<sup>6</sup> *Doubleday v. Sherman*, 8  
Blatch., 45.

injured party and the state, although the petitioner injured by the violation should be allowed the costs and expenses of his proceedings in attachment.<sup>1</sup>

§ 1458. The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and upon proceedings by attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the judgment of the court itself. And courts of appellate powers are exceedingly averse to interfering with the exercise of such judgment and discretion, and will not, ordinarily, revise the action of the inferior court in such matters.<sup>2</sup>

§ 1459. In proceedings in attachment for contempt of court in violating an injunction, general evidence as to the damage sustained by petitioner from the violation in question is admissible to show its character, although evidence of other acts of contempt than those charged is ordinarily inadmissible. And in such proceedings it is not permissible to show that the allegations of the bill upon which the injunction was granted are not true, since if untrue the proper course is to apply to the court to modify or dissolve the injunction. A defendant who is enjoined will not, therefore, be permitted to violate the mandate of the court, and then to attempt to excuse his disobedience by showing that the injunction was unfounded. While the injunction should always be plain and specific, since a defendant can not be entrapped into a contempt of court by vague and general orders, yet where he is enjoined from interfering with certain trade marks, which are particularly described in the bill, such description will be deemed sufficient upon proceedings against him for contempt.<sup>3</sup>

§ 1460. A court of equity has jurisdiction to punish a corporation as well as a private person for contempt in vio-

<sup>1</sup> *Rogers Manufacturing Co. v. Lampkin*, 53 Ga., 200; *Thweatt v. Rogers*, 38 Conn., 121. *Gammell*, 56 Ga., 98.

<sup>2</sup> *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121; *Williams v. Rogers*, 38 Conn., 121. <sup>3</sup> *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121.

lating an injunction.<sup>1</sup> And where there has been a gross contempt of court in the violation of an injunction by a board of municipal officers, a sequestration has been awarded as a punishment for the offense, when there was property upon which the sequestration could operate.<sup>2</sup> And each separate violation constitutes a separate contempt which may be punished by attachment.<sup>3</sup>

§ 1461. While an attachment for contempt is the usual and accustomed remedy for the violation of an injunction, the court is not necessarily confined to the process of attachment alone. And where, pending an interlocutory injunction and before the final hearing, a defendant violates the mandate of the court by taking possession of the lands in controversy, it is competent for the court upon final hearing to direct that possession be restored as it was when the bill was filed; and this may be done, even though the injunction is refused upon the final hearing.<sup>4</sup> And when defendants are enjoined from selling personal property, but they proceed to sell some of the property in violation of the injunction, the court may, as a punishment for the contempt, require them to pay into court the money received, or to restore the property, and in default thereof to be committed for contempt.<sup>5</sup> But it is not proper by an order of attachment for contempt to require defendant to deliver up possession of property, when such delivery was not required by the terms of the injunction, and when it is not shown that defendants possessed themselves of the property in question subsequent to the injunction, or in violation of its terms.<sup>6</sup>

§ 1462. We have already seen that the fact of an injunction having been erroneously granted in the first in-

<sup>1</sup> *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 622; *People v. Albany & V. R. Co.*, 12 Ab. Pr., 171; *Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal. 187.

<sup>3</sup> *Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal., 187.

<sup>4</sup> *Byne v. Byne*, 54 Ga., 257.

<sup>5</sup> *Thweatt v. Gammell*, 56 Ga., 98.

<sup>2</sup> *Spokes v. Banbury Board of Health*, L. R. 1 Eq., 42.

<sup>6</sup> *Columbia Water Power Co. v. Columbia*, 4 S. C., 388.

stance affords no justification or excuse for its violation.<sup>1</sup> It may, however, affect the question of punishment, and may be taken into consideration by the court in determining whether a defendant shall be attached for contempt. And it has been held that after the dissolution of an injunction erroneously or improperly granted, an attachment for its violation will not lie.<sup>2</sup> But where proceedings are instituted in behalf of the people for contempt in the violation of an injunction, they may, if begun before, be prosecuted after the injunction is dissolved.<sup>3</sup>

§ 1463. The proper remedy against a plaintiff in execution who proceeds with a levy, notwithstanding he has been enjoined from so doing, is by attachment, and not by *supersedeas*.<sup>4</sup> And where an injunction has been issued to prevent the infringement of a statutory franchise, an attachment will issue for contempt in violating the writ.<sup>5</sup>

§ 1464. One who is in contempt for the violation of an injunction will not usually be allowed a hearing upon a motion to dissolve, although if the nature and extent of the punishment to be inflicted depend upon the determination of the question whether the injunction shall be continued, a hearing may be had on the motion to dissolve.<sup>6</sup>

§ 1465. Upon a motion for an attachment for a breach of an injunction restraining the use of a patent right, affidavits will not be admitted to show that complainant was not the original inventor. The question in such a case is not as to the merits of the writ itself, but whether it has actually been disobeyed. And if it be made to appear that the injunction has really been violated, but defendant is protected from attachment by a defective service of the writ, he will not be allowed costs on refusal of the motion

<sup>1</sup> *Moat v. Holbein*, 2 Edw. Ch., 188; *People v. Sturtevant*, 9 N. Y., 263; *Sullivan v. Judah*, 4 Paige, 444; *Richards v. West*, 2 Green Ch., 456.

<sup>2</sup> *Moat v. Holbein*, 2 Edw. Ch., 188.

<sup>3</sup> *Cook v. The People*, 16 Ill., 534.

<sup>4</sup> *Commercial Bank v. Waters*, 10 Sm. & Mar., 559.

<sup>5</sup> *In re Vanderbilt*, 4 Johns. Ch., 57.

<sup>6</sup> *Endicott v. Mathis*, 1 Stockt., 110.

to attach.<sup>1</sup> And when defendant has been found guilty of a contempt in violating an injunction restraining him from the use of a patented invention, but he does not appear to have acted in wilful disregard of the orders of the court, the payment of all profits made or damages occasioned by such use, with the costs of the proceeding, has been held to be a sufficient punishment.<sup>2</sup>

§ 1466. In Wisconsin it is held that where proceedings have been instituted for the punishment of a breach of injunction, an order of court adjudging defendants guilty of contempt in violating the writ is in the nature of a judgment or order in a criminal proceeding, and therefore is not appealable.<sup>3</sup>

<sup>1</sup> Whipple v. Hutchinson, 4 Blatch., 190.

<sup>2</sup> Ready Roofing Co. v. Taylor, 15 Blatch., 94.

<sup>3</sup> *In re* Murphey, 39 Wis., 286; Town of Williamstown v. Darge, 71 Wis., 643. But see Shannon v. State of Wisconsin, 18 Wis., 604.



## CHAPTER XXIX.

### OF THE DISSOLUTION OF INTERLOCUTORY INJUNCTIONS.

I.	GROUNDS OF DISSOLUTION . . . . .	§ 1467
II.	DISSOLUTION UPON ANSWER . . . . .	1505
III.	INJUNCTIONS AGAINST SEVERAL DEFENDANTS . . . .	1528
IV.	INJUNCTIONS AGAINST PROCEEDINGS AT LAW . . . .	1536
V.	INJUNCTIONS AFFECTING REALTY . . . . .	1542

#### I. GROUNDS OF DISSOLUTION.

- § 1467. The general doctrine stated.
- 1468. When motion to dissolve entertained.
- 1469. Motion to dissolve before answer.
- 1470. Burden of proof; effect of answer.
- 1471. Effect of failure to answer allegations.
- 1472. Answer must be responsive.
- 1473. Vagueness of writ; want of equity; failure to answer; scandal and impertinence.
- 1474. Misrepresentation or suppression of facts by plaintiff.
- 1475. Full and positive denial required in answer.
- 1476. Dismissal of bill operates as a dissolution.
- 1477. Effect of dissolution upon the main action.
- 1478. Injunction not perpetuated on refusal to dissolve.
- 1479. Injunction in aid of specific performance.
- 1480. Defendant's laches a bar to dissolution.
- 1481. Effect of new matter in answer.
- 1482. Technical errors; insufficient bond.
- 1483. Abuse of trust.
- 1484. Matters of record; improper verification.
- 1485. When decree for payment of money equivalent to dissolution.
- 1486. Effect of giving security.
- 1487. When plaintiff estopped from second injunction.
- 1488. Injunction against illegal tax.
- 1489. Irregularity in service no ground for dissolution.
- 1490. Delay in prosecuting suit.
- 1491. Unsettled questions of law.
- 1492. Unsettled disputes; statute of limitations.
- 1493. Verification by one of several complainants.

§ 1494. Judgment on demurrer.

1495. Doctrine of relative convenience; act enjoined already performed.

1496. Failure to give bond or verify bill.

1497. Dissolution upon giving security.

1498. Indemnity bond; return of property; account; arbitration.

1499. Injunction against transfer of property *pendente lite*.

1500. *Cestui que trust* not heard on motion to dissolve.

1501. Dissolution or perpetuation of injunction as *res judicata*.

1502. Removal of cause to United States court.

1503. Injunction granted until given day.

1504. Dissolution unless cause set for hearing.

§ 1467. A marked feature of interlocutory injunctions, as distinguished from those which are final or perpetual, is that the former are liable to be dissolved upon sufficient cause shown at any stage of the proceedings, after the coming in of the answer. And in general it may be said to rest in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it until a final hearing upon the merits, if such course shall seem best calculated to subserve the ends of justice and to protect the rights of all parties in interest.<sup>1</sup> The dissolution or continuance of an injunction after answer filed being, therefore, largely a matter of judicial discretion, appellate courts are averse to interfering with the exercise of such discretion.<sup>2</sup> And in granting a dissolution the court may, in its discretion, impose such terms as may be necessary to secure substantial justice.<sup>3</sup>

§ 1468. In some of the states the rule has been broadly laid down that an interlocutory or preliminary injunction may be dissolved at any stage of the cause, either before or after answer filed, or after demurrer to the bill,<sup>4</sup> while in

<sup>1</sup> *Chetwood v. Brittan*, 1 Green Ch., 438; *Firmstone v. De Camp*, 2 C. E. Green, 309; *Attorney-General v. Oakland County Bank*, Walk. (Mich.), 90; *Shellman v. Scott*, Charl. R. M., 380; *Holt v. Bank of Augusta*, 9 Ga., 552; *Dent v. Summerlin*, 12 Ga., 5.

<sup>2</sup> *Rogers v. Tennant*, 45 Cal., 184.

<sup>3</sup> *Cook v. Jenkins*, 35 Ga., 113.

<sup>4</sup> *Jones v. Commercial Bank*, 5 How. (Miss.), 43. And see *Minturn v. Seymour*, 4 Johns. Ch., 173.

others the doctrine prevails that a motion to dissolve will not be entertained until after the coming in of the answer.<sup>1</sup> But a motion to dissolve will not be entertained pending a general demurrer to the bill, since the motion involves the same questions of equity which must arise upon the demurrer, and is an attempt to obtain, by the summary action of the court, a decision as to the equity of the case, which should be determined upon demurrer.<sup>2</sup> In the case of a bill of discovery, however, which also prays an injunction against a judgment at law, if the bill contains no allegations sufficient to entitle complainant to a discovery, and no ground upon which the injunction can be sustained, a dissolution may be had upon motion, without the answer of the party from whom the discovery is sought.<sup>3</sup> But a motion to dissolve such an injunction for want of equity in the bill will not be allowed before answer filed, when the bill charges that the obligations sued on at law were obtained without consideration and by fraud, and the affidavits annexed to the bill are sufficient to make out a *prima facie* case of fraud.<sup>4</sup>

§ 1469. Where an injunction has been irregularly obtained, or complainant has not used due diligence in the prosecution of his suit, it may be dissolved before the coming in of the answer.<sup>5</sup> If, however, plaintiff's delay or laches, which is urged as a ground for dissolution, was caused through mistake and inadvertence, and no evidence of wilful procrastination appears, the injunction will not be dissolved.<sup>6</sup> But a motion to dissolve will be entertained, notwithstanding complainant has amended his bill and no answer has yet been filed to the bill as amended.<sup>7</sup> And

<sup>1</sup> *Rentfroe v. Dickinson*, 1 Overt., 196; *Taylor v. Morgan*, 2 Mart. O. S., 77.

<sup>2</sup> *Ransom v. Shuler*, 8 Ired. Eq., 304.

<sup>3</sup> *Zoll v. Campbell*, 3 West Va., 226.

<sup>4</sup> *Shotwell's Admr'x v. Smith*, 5 C. E. Green, 79.

<sup>5</sup> *Depeyster v. Graves*, 2 Johns.

Ch., 148; *Woodhull v. Neafie*, 1 Green Ch., 409, and note; *Corey v. Voorhies*, Ib., 5; *West v. Smith*, Ib., 309; *Receivers v. Biddle*, 3 Green Ch., 222. But see, *contra*, *Taylor v. Morgan*, 2 Mart. O. S., 77.

<sup>6</sup> *Schermehorn v. L'Espenasse*, 2 Dall., 360.

<sup>7</sup> *Semmes v. Mayor*, 19 Ga., 471.

where upon its face the bill is wanting in equity to sustain the injunction, it may be dissolved on motion without answer.<sup>1</sup> Or, if an injunction has been granted contrary to the provisions of an imperative statute, the defendant is entitled to summary relief, and the order will be set aside for irregularity, without putting him to his motion to dissolve.<sup>2</sup> If, however, the motion is interposed before answer, it is regarded as in the nature of a demurrer, by which defendant admits the truth of all the allegations relied upon as a foundation for the injunction.<sup>3</sup> Thus, a motion to dissolve the injunction before answer, on the ground of insufficiency in the allegations of the bill, operates as a demurrer and admits the truth of all the facts alleged.<sup>4</sup>

§ 1470. Upon the hearing of a motion to dissolve an injunction the defendant is considered as the actor, and upon him rests the burden of disproving the equities of the bill.<sup>5</sup> Such full and positive proof, however, is not exacted as would be necessary upon a final hearing of the cause, since the effect of requiring such strictness of proof might be to prevent a dissolution until the final hearing.<sup>6</sup> And while, for the purposes of such motion, defendant's answer is to be taken as true in so far as it is responsive to the allegations of the bill,<sup>7</sup> yet it should fully and fairly meet complainant's equities, without evasion and without passing over material allegations. Even then, if a reasonable doubt exists in the mind of the court as to whether the equity of

<sup>1</sup> *Kneedler v. Lane*, 3 Grant's Cases, 523.

<sup>2</sup> *Marlatt v. Perrine*, 2 C. E. Green, 49. And see, as to the distinction between discharging an injunction for irregularity and dissolving it for want of equity, *Judah v. Chiles*, 3 J. J. Marsh., 302.

<sup>3</sup> *Titus v. Mabee*, 25 Ill., 257; *Hickey v. Stone*, 60 Ill., 458; *Bennett v. McFadden*, 61 Ill., 334; *Jenkins v. Felton*, 9 Rob. (La.), 200;

*Ludington v. Tiffany*, 6 West Va., 11. And see *Schwarz v. Sears, Harring.* (Mich.), 440.

<sup>4</sup> *Jenkins v. Felton*, 9 Rob. (La.), 200; *Ludington v. Tiffany*, 6 West Va., 11.

<sup>5</sup> *Miller v. Washburn*, 3 Ired. Eq., 161.

<sup>6</sup> *North's Ex'r v. Perrow*, 4 Rand., 1.

<sup>7</sup> *Brewer v. Day*, 8 C. E. Green, 418.

the bill is sufficiently answered, the injunction will not be dissolved, but will be continued to the hearing.<sup>1</sup> And upon a motion to dissolve the answer is taken as evidence only of such facts as are responsive to the bill.<sup>2</sup>

§ 1471. Upon a motion to dissolve upon bill and answer, such allegations of the bill as are not denied by the answer are to be taken as true, since they stand upon the affidavit of complainant, and are entitled to as much weight upon the motion to dissolve as upon the original motion for the injunction.<sup>3</sup> It follows, therefore, that everything is to be presumed against the defendant with respect to any matter as to which he might have answered fully and directly, but has not done so.<sup>4</sup> And so long as any material allegations of the bill remain unanswered, or if the answer does not fully meet the case disclosed by the bill, the injunction will not be dissolved, but will be continued until the final hearing of the cause.<sup>5</sup>

§ 1472. To warrant a dissolution upon bill and answer, the answer should deny the material allegations of the bill with the same clearness and certainty with which they are charged.<sup>6</sup> And for the purposes of such a motion, the answer is considered only in so far as it is responsive to the allegations of the bill on which the writ issued.<sup>7</sup> New matter, therefore, not responsive to any allegations of the bill, will not be considered on the hearing of such a motion.<sup>8</sup> But if the answer so far denies the material allegations of

<sup>1</sup>North's Ex'r v. Perrów, 4 Rand., 1.

<sup>2</sup>Robinson v. Cathcart, 2 Cranch C. C., 590. And see Rembert v. Brown, 17 Ala., 667.

<sup>3</sup>Brown v. Stewart, 1 Md. Ch., 87; Cronise v. Clark, 4 Md. Ch., 403; Randolph v. Randolph, 6 Rand., 194; Merwin v. Smith, 1 Green Ch., 182; Yale v. Moore, 3 Tenn. Ch., 76. And see Parks v. Spurgin, 3 Ired. Eq., 153.

<sup>4</sup>Parks v. Spurgin, 3 Ired. Eq., 153.

<sup>5</sup>Brown v. Stewart, 1 Md. Ch., 87; Yale v. Moore, 3 Tenn. Ch., 76.

<sup>6</sup>Buckner v. Bierne, 9 Sm. & Mar., 304.

<sup>7</sup>Rembert v. Brown, 17 Ala., 667. And see Robinson v. Cathcart, 2 Cranch C. C., 590.

<sup>8</sup>Wooten v. Smith, 27 Ga., 216; Armstrong v. Potts, 8 C. E. Green, 92; Vreeland v. New Jersey Stone Co., 10 C. E. Green, 140; Johnston v. Corey, Ib., 311. And see Lawrence v. Philpot, 27 Ga., 585.

the bill as to leave it without equity, even as to facts which it does not deny, the injunction will be dissolved.<sup>1</sup>

§ 1473. Where an injunction is so vague and indefinite in its terms as not to apprise defendants of the premises touching which they are enjoined, a dissolution should be allowed.<sup>2</sup> But where the bill shows on its face sufficient cause for granting the injunction, it is error to dissolve it on motion for want of equity.<sup>3</sup> So a motion to dissolve, if based upon the want of equity in the bill, will be disallowed when the bill presents a case for equitable relief, although defectively stated; since the injunction being only intended to preserve the *status quo*, the want of equity ought to be palpable to warrant a dissolution upon such motion.<sup>4</sup> And if defendant declines answering, he is to be regarded on the motion to dissolve as admitting the material allegations of the bill, and it is therefore error to dissolve the injunction, sufficient cause for its retention appearing upon the bill itself.<sup>5</sup> If, however, the whole equity of the bill be denied by the answer, it is no sufficient objection to the motion to dissolve that defendant has incorporated scandalous and impertinent matter into his answer.<sup>6</sup>

§ 1474. The utmost good faith being required of those who invoke the extraordinary remedies of equity, it follows that deception or misrepresentation on the part of the person obtaining the injunction affords strong ground for its dissolution. And when it is apparent upon a motion to dissolve an injunction granted *ex parte* that complainant has misrepresented his case, either by actual misstatement, or by a suppression of facts material to a full understanding of the equities involved, and that upon a correct statement of the facts the writ would not have been granted, such misrepresentation is of itself a sufficient ground for a

<sup>1</sup> Moore v. Barclay, 23 Ala., 739;  
Rogers v. Bradford, 29 Ala., 474.

<sup>4</sup> Love v. Allison, 2 Tenn. Ch., 111.

<sup>5</sup> Peatross v. McLaughlin, 6 Grat.,

<sup>2</sup> Avery v. Onillon, 10 La. An., 64.  
127.

<sup>6</sup> Livingston v. Livingston, 4  
Paige, 111.

<sup>3</sup> Floyd v. Turner, 23 Tex., 292.

dissolution.<sup>1</sup> Nor is it a sufficient explanation of complainant's conduct in such a case to say that he had forgotten the facts which were omitted, or that he was not aware of their importance.<sup>2</sup> But in order to bring a case within the rule as here laid down, the degree of misrepresentation must have been such as to have influenced the court in granting the writ, by presenting a case different from that which actually existed.<sup>3</sup> And the fact that an injunction granted *ex parte* has been dissolved because of the suppression of material facts in obtaining it constitutes no bar to a future application for another injunction in the same case.<sup>4</sup> But where defendant's answer fully denies the case made by the bill, and plaintiff has misstated his case, he will not be allowed to avail himself of matters alleged in the answer to maintain his injunction, and a dissolution will be allowed.<sup>5</sup> And it would seem that the question as to whether there was a misrepresentation or suppression of important facts in obtaining an injunction will not be considered on an appeal from an order granting or continuing the writ.<sup>6</sup>

§ 1475. To entitle a defendant to a dissolution of an injunction, he must deny the entire equity of the bill, directly and without evasion. It will not suffice that he answers the several charges or allegations literally, but he must traverse the substance of each charge specifically and not merely by a vague and general denial. And where defendant's answer is manifestly evasive and indirect, even though it may be true in substance as alleged, the motion to dis-

<sup>1</sup> *Endicott v. Mathis*, 1 Stockt., Eq., 57; *Dease v. Plunkett*, Drury, 110; *Brown v. Newall*, 2 Myl. & Cr., 558; *Sturgeon v. Hooker*, 1 DeG. & Sm., 484; *Dalglish v. Jarvie*, 2 Mac. & G., 231; *Black v. Huggins*, 2 Tenn. Ch., 780; *Greenhalgh v. Manchester B. R. Co.*, 3 Myl. & Cr., 799; *Stedman v. Webb*, 4 Myl. & Cr., 346. See also *Hemphill v. McKenna*, 2 Con. & Law., 76; *S. C.*, 3 Dr. & War., 183; *S. C.*, 6 Ir.

*Eq.*, 57; *Dease v. Plunkett*, Drury, 110; *Brown v. Newall*, 2 Myl. & Cr., 558; *Sturgeon v. Hooker*, 1 DeG. & Sm., 484; *Dalglish v. Jarvie*, 2 Mac. & G., 231; *Black v. Huggins*, 2 Tenn. Ch., 780; *Greenhalgh v. Manchester B. R. Co.*, 3 Myl. & Cr., 799; *Stedman v. Webb*, 4 Myl. & Cr., 346. See also *Hemphill v. McKenna*, 2 Con. & Law., 76; *S. C.*, 3 Dr. & War., 183; *S. C.*, 6 Ir.

<sup>2</sup> *Clifton v. Robinson*, 16 Beav., 355.

<sup>3</sup> *Brown v. Newall*, 2 Myl. & Cr., 558.

<sup>4</sup> *Fitch v. Rochfort*, 18 L. J. Ch., 458.

<sup>5</sup> *Cresy v. Beavan*, 13 Sim., 99.

<sup>6</sup> *Bell v. Hull & Selby R. Co.*, 1 Ra. Ca., 616.

solve will not be allowed.<sup>1</sup> The doctrine as thus stated seems to follow necessarily from the rule, that for the purposes of a motion to dissolve an injunction, any allegation in the bill which is evaded by the answer is to be taken as true in substance.<sup>2</sup> And where defendants answer evasively, alleging an improbable version of the transactions out of which complainant's equities have arisen, the court may, in the exercise of a sound discretion, order the injunction continued to the final hearing.<sup>3</sup> Where, however, some of the denials in an answer relied upon for the dissolution of an injunction, although true in themselves, are yet evasive by reason of the manner in which they are made, and are not such as would be sustained on exceptions, yet if other portions of the answer allege facts responsive to the bill, and which, by reason of their being inconsistent with the allegations of the bill, thus deny such allegations, such portions of the answer may be taken in connection with its evasive allegations, and thus constitute a sufficient denial to warrant a dissolution.<sup>4</sup>

§ 1476. Where, as is frequently the case with interlocutory injunctions, the injunction is merely ancillary to the principal relief sought by the bill, the dismissal of the bill of necessity works a dissolution of the injunction *ipso facto*.<sup>5</sup> Upon the bill being dismissed, therefore, the injunction falls, as of course, and without further proceedings.<sup>6</sup> And a preliminary injunction is disposed of by the decision of the court upon the final hearing on the merits denying a permanent injunction.<sup>7</sup> So when an interlocutory injunction is obtained, but no final hearing is had upon the merits, and an order is afterward entered striking the cause from the docket, which order is acquiesced in by plaintiff

<sup>1</sup> Everly v. Rice, 3 Green Ch., 553; Rich v. Thomas, 4 Jones Eq., 71; Wilson v. Mace, 2 Jones Eq., 5.

<sup>2</sup> Wilson v. Hendricks, 1 Jones Eq., 295.

<sup>3</sup> Jones v. Edwards, 4 Jones Eq., 257.

<sup>4</sup> McMahon v. O'Donnell, 5 C. E. Green, 306.

<sup>5</sup> Green v. Pulsford, 2 Beav., 72; Coleman v. Hudson, 5 Blatch., 56.

<sup>6</sup> Green v. Pulsford, 2 Beav., 72.

<sup>7</sup> Christopher & T. S. R. Co. v. Central C. R. Co., 67 Barb., 315.



without any effort to reinstate the cause, the order operates as a virtual dissolution of the injunction.<sup>1</sup> So where the bill for injunction is auxiliary to an action at law, on the dismissal of the proceedings at law the injunction usually shares the same fate.<sup>2</sup> But where a railway company is enjoined from using complainant's land until satisfaction of a judgment obtained against the company for the appropriation of his land, the order for the injunction will not be reversed because of the reversal of the judgment for want of jurisdiction.<sup>3</sup>

§ 1477. It does not follow, however, that upon the dissolution of an injunction the bill upon which it was granted must be dismissed, since other and further proceedings may be necessary to give the relief sought by the action, and complainant is still entitled to continue his cause as an original suit whenever further proceedings are necessary to give him relief.<sup>4</sup> And the injunction being regarded as collateral to the main object of the bill, the suit remains after its dissolution, and no motion to retain it is necessary.<sup>5</sup> It is therefore erroneous to dismiss the bill upon dissolving the injunction, and complainant has a right, if he desires, to proceed to a final hearing of the cause as if no injunction had been prayed or granted.<sup>6</sup> And while it is proper to dissolve a preliminary injunction upon the answer fully denying all the material facts of the bill upon which the right to the injunction was based, or for want of proper verification of the bill, yet if the bill itself states a case which would, if proven, entitle plaintiff to an injunction or other relief upon the final hearing, it is error to dismiss the bill upon dissolving the injunction, and it should

<sup>1</sup> *Gold v. Johnson*, 59 Ill., 62.

<sup>2</sup> *Phelps v. Foster*, 18 Ill., 309.

<sup>3</sup> *Sturtevant v. Milwaukee R. Co.*,  
11 Wis., 63.

<sup>4</sup> *Blow v. Taylor*, 4 Hen. & M.,  
159; *Ruffners v. Barrett*, 6 Munf.,  
207; *Massie v. Mann*, 17 Iowa, 131;  
*Kelley v. Whitmore*, 41 Tex., 647;

*Wilson v. Weber*, 3 Bradw., 125;

*Russell v. Wilson*, 37 Iowa, 377.

<sup>5</sup> *Cole v. Sands*, 1 Overt., 183.

<sup>6</sup> *Johnson v. Alexander*, 6 Ark.,  
302; *Bettison v. Jennings*, 8 Ark.,  
287; *Love v. Powell*, 67 Tex., 15;  
*Walters v. Fredericks*, 11 Iowa, 181;  
*Russell v. Wilson*, 37 Iowa, 377;

be retained until the final hearing.<sup>1</sup> If, however, the dissolution leaves nothing more to be decided in the injunction suit, it is proper for the court to order the case stricken from the docket, nothing more remaining to be tried in the action.<sup>2</sup> And since a motion to dissolve for want of equity in the bill operates as a demurrer, a decree sustaining such motion and dissolving the injunction is final if no other relief is sought in the case, and an appeal will lie from such decree.<sup>3</sup> But when the motion is heard upon bill, answer and affidavits, it is error to dismiss the bill upon dissolving the injunction when other relief is sought, and it should be retained to a final hearing.<sup>4</sup> If, however, the motion to dissolve is based upon the fact disclosed in the answer that another court of co-ordinate powers has prior jurisdiction of the subject-matter and of the parties, and this is made to appear to the satisfaction of the court, it is proper to dissolve the injunction and to dismiss the bill at once and without further proceedings.<sup>5</sup>

§ 1478. Upon overruling a motion to dissolve, the court will not usually make the injunction perpetual, since the defendant still has a right to be heard upon the merits, and a decree making an injunction perpetual can only be rendered upon a bill *pro confesso*, upon overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits and proofs.<sup>6</sup> But after an injunction bill has been taken *pro confesso* for want of an answer, a motion will not be

Wilson v. Weber, 3 Bradw., 125;  
Drane v. Winter, 41 Miss., 517.  
And see Hooker v. Austin, 41 Miss.,  
717.

<sup>1</sup> Russell v. Wilson, 37 Iowa, 337;  
Pullen v. Baker, 41 Tex., 419; Love  
v. Powell, 67 Tex., 15.

<sup>2</sup> Wade v. London, 30 La. An.,  
660.

<sup>3</sup> Titus v. Mabey, 25 Ill., 257.

<sup>4</sup> Hummert v. Schwab, 54 Ill.,  
142.

<sup>5</sup> Withers v. Denmead, 22 Md.,  
135.

<sup>6</sup> Ottawa v. Walker, 21 Ill., 610.  
But in Texas it is held that when  
the court overrules a motion to dis-  
solve upon hearing and argument  
and the allegations of the bill are  
not denied in any matter material  
to the rights of the parties, and de-  
fendants do not demand a jury  
trial, but give notice of an appeal,  
it is not error to make the injunc-

entertained in behalf of defendant for a dissolution of the injunction as having been improperly granted.<sup>1</sup>

§ 1479. Where the writ has been granted merely as auxiliary to the principal relief sought, as in the case of a bill for specific performance of a contract with an injunction in aid thereof, the injunction will be dissolved when the case presented by the bill is such as would not authorize the aid of equity to enforce the contract.<sup>2</sup> And where the bill seeks the specific performance of a contract, and an injunction is granted as auxiliary to this purpose, if it appears that the contract is not concluded or certain in all its parts, so that it can be specifically enforced, the injunction will be dissolved for want of equity in the bill.<sup>3</sup>

§ 1480. Delay or laches on the part of a defendant in seeking the aid of the court for the dissolution of an injunction may constitute sufficient ground for refusing the motion. And where there has been long acquiescence under an order for an injunction, the courts are slow to entertain a motion for its dissolution.<sup>4</sup> And although complainant was guilty of a suppression of material facts in obtaining the injunction, yet a delay of several months on the part of defendants, before taking steps for its dissolution, will prevent them from obtaining a dissolution on the ground of the deception used in obtaining the writ.<sup>5</sup>

§ 1481. The rule is well settled that on a motion to dissolve an injunction defendant will not be permitted to rely upon new matter in his answer in avoidance, but can only rely upon a direct and positive denial of complainant's equities.<sup>6</sup> And no principle of the law of injunctions is better established than that where the equity of the bill is

tion perpetual. *Alsup v. Allen*, 43 Tex., 598.

<sup>1</sup> *Turpin v. Jefferson*, 4 Hen. & M., 483.

<sup>2</sup> *Geiger v. Green*, 4 Gill, 472.

<sup>3</sup> *McKibbin v. Brown*, 1 McCart.,

13.

<sup>4</sup> *Feistel v. King's College*, 10

*Beav.*, 491; *Bickford v. Skews*, 4 Myl. & Cr., 500; *Bell v. Hull & Selby R. Co.*, 1 Ra. Ca., 616; *McCoy v. McCoy*, 29 West Va., 794.

<sup>5</sup> *Bell v. Hull & Selby R. Co.*, 1 Ra. Ca., 616.

<sup>6</sup> *Salmon v. Claggett*, 3 Bland, 125; *Bellona Company's Case*, *Ib.*, 442.

admitted by the answer or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of complainant's equities and the injunction will not be dissolved, but will be continued until a hearing of the cause.<sup>1</sup> So a defendant upon a motion to dissolve will not be allowed to avail himself of new matter set up in a supplemental answer.<sup>2</sup> Where, however, the answer fully and unequivocally denies all the material allegations of the bill, the fact that it contains new matter, in addition to that in denial, constitutes no bar to a dissolution of the injunction.<sup>3</sup>

§ 1482. Mere technical errors or inaccuracies in matters of form, either in the bill or in the order of the court granting the injunction, will not avail a defendant on a motion to dissolve, provided the bill shows sufficient equity to entitle complainant to the writ.<sup>4</sup> Thus, the omission to ask for the injunction in the prayer for process, it being prayed for in the general prayer of the bill, does not constitute ground for a dissolution, even though it might have been a sufficient objection to warrant the court in refusing the injunction in the first instance.<sup>5</sup> And where a dissolution is sought on account of the insufficiency of the bond, the order of the court dissolving the injunction should not be made absolute in the first instance, but a reasonable time should

<sup>1</sup> *Moss v. Pettingill*, 3 Minn., 217; *Iowa*, 494; *Judd v. Hatch*, 31 *Iowa*, 491; *Huskins v. McElroy*, 62 *Iowa*, 508; *Hayes v. Billings*, 69 *Iowa*, 387. But see *Society v. Butler*, 1 *Beas.*, 498, reversing same case, *Ib.*, 264.

<sup>2</sup> *Maryland v. Northern C. R. Co.*, 18 *Md.*, 193.

<sup>3</sup> *Shricker v. Field*, 9 *Iowa*, 366.

<sup>4</sup> *Beauchamp v. Supervisors*, 45 *Ill.*, 274; *Taylor v. Snyder*, *Walk. (Mich.)*, 490.

<sup>5</sup> *Taylor v. Snyder*, *Walk. (Mich.)*, 490.

*Green v. Pallas*, 1 *Beas.*, 267; *The Society v. Low*, 2 *C. E. Green*, 19; *Huffman v. Hummer*, 2 *C. E. Green*, 263; *McNamara v. Irwin*, 2 *Dev. & Bat. Eq.*, 13; *Lyrely v. Wheeler*, 3 *Ired. Eq.*, 170; *Strong v. Menzies*, 6 *Ired. Eq.*, 544; *Attorney-General v. Oakland County Bank*, *Walk. (Mich.)*, 90; *Kerns v. Chambers*, 3 *Ired. Eq.*, 576; *Hutchins v. Hope*, 12 *Gill & J.*, 245; *Magnet M. Co. v. Page & P. S. M. Co.*, 9 *Nev.*, 346; *Speak v. Ransom*, 2 *Tenn. Ch.*, 210; *Fargo v. Ames*, 45

be allowed for the filing of a new bond, the injunction meanwhile remaining in force.<sup>1</sup> Nor should a dissolution be allowed because of insufficiency of the bond, when it is apparent that plaintiff would be immediately entitled to another injunction upon the same state of facts.<sup>2</sup>

§ 1483. Where an injunction has been obtained on general allegations in the bill of an abuse of trust, which are denied by the answer, so much of the injunction as restrains defendant from any further exercise of his trust may be dissolved, upon the ground that a general charge of abuse of trust is not sufficient to warrant the interposition of a court of equity; in such cases the specific facts relied upon should be made to appear.<sup>3</sup>

§ 1484. If all the facts necessary for obtaining an injunction are matters of record, although not properly presented to the court on the application for the writ, and the applicant has an unquestioned right to a new injunction in case the first is dissolved, the motion for a dissolution will not be granted.<sup>4</sup> So although the injunction may have been improvidently or irregularly allowed in the first instance, it will not be dissolved when it is apparent from the record that plaintiff would be entitled to another injunction immediately upon the dissolution.<sup>5</sup> If, however, the allegations constituting the foundation for the relief are improperly sworn to, the injunction may be dissolved, even though the party aggrieved is entitled to a new one upon the dissolution of the first.<sup>6</sup>

<sup>1</sup> *Beauchamp v. Supervisors*, 45 Ill., 274; *Gamble v. Campbell*, 6 Fla., 347; *Smith v. Harrington*, 49 Miss., 771.

<sup>2</sup> *Henderson v. Maxwell*, 22 La. An., 357.

<sup>3</sup> *Cooper v. Cooper*, 1 Halst. Ch., 9.

<sup>4</sup> *Campbell v. His Creditors*, 8 La., 71.

<sup>5</sup> *Dupre v. Swafford*, 25 La. An., 222; *Savoie v. Thibodeaux*, 28 La. An., 169.

<sup>6</sup> *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44. But see *Lewis v. Daniels*, 23 La. An., 170, where it is held that a dissolution will not be allowed because of an informality in the jurat to the affidavit upon which the injunction was granted, when the facts disclosed are such as to warrant the relief.

§ 1485. The same effect which would attend a formal dissolution may sometimes be reached in other ways. Thus, a decree for the payment of money, which had been enjoined in the hands of one who was a party to the action, has the same effect as a dissolution and practically works a dissolution, although no formal order of the court has been made dissolving the injunction.<sup>1</sup> So where one has obtained an injunction until answer or further order of the court, he being sole complainant in the bill, and he afterward amends the bill by joining another person as co-complainant, such an amendment operates as a dissolution.<sup>2</sup>

§ 1486. The fact of defendant in an injunction suit having given security to perform and abide by the decree of a court of another state, in a suit between the same parties and involving the same subject-matter, will not of itself warrant a dissolution, unless defendant gives security for the payment of the debt which he admits to be due.<sup>3</sup> But where a deposit is made by way of security for costs on obtaining an injunction, as is required in many of the states, the right to the money deposited can not be decided until the final hearing, and defendant is not entitled to it immediately upon a dissolution of the injunction on bill and answer.<sup>4</sup>

§ 1487. While, as we have already seen, the jurisdiction of equity for renewing or reviving injunctions improperly dissolved is freely exercised, yet complainant may, by his own acts, be estopped from receiving the aid of a court to restore an injunction upon the grounds on which it was originally granted. Thus, where the dissolution is had without the authority or consent of complainant, but is afterward recognized and acted upon by him, the writ will not be renewed unless upon new and special reasons being shown for the exercise of the jurisdiction, which did not exist

<sup>1</sup> Crook's *Ex'r v. Turpin*, 10 B. Mon., 243.

<sup>3</sup> *McKim v. Fulton*, 1 Overt., 238.

<sup>2</sup> *Attorney-General v. Marsh*, 16 Sim., 572.

<sup>4</sup> *Leggett v. Dubois*, 1 Paige, 574.

when the injunction was originally granted, or when it was dissolved.<sup>1</sup>

§ 1488. While there is much conflict of authority as to the right of injunction against an illegal or unauthorized tax, yet if the writ has been granted it will be dissolved upon the tax being legalized by legislative authority. And where a perpetual injunction is granted to restrain the payment of a bounty voted by a town meeting to drafted men or their substitutes for the military service, it may be dissolved after the passage by the legislature of an act legalizing the bounty.<sup>2</sup>

§ 1489. Mere irregularities in the service of an injunction constitute no ground for its dissolution, since it is sufficient that defendant is apprised of its existence. Thus, the fact that the writ was served upon defendant beyond the jurisdiction of the court, and in a manner different from the usual and settled practice, is not sufficient reason for a dissolution. And upon a motion to dissolve on the ground of defective service, the sheriff's return is conclusive, and the court will not allow it to be contradicted by affidavit, unless fraud or collusion is shown.<sup>3</sup> Nor will any informality in the service of notice of the motion for a preliminary injunction or of the writ avail defendants upon a motion to dissolve upon the coming in of the answer, since, in conformity with the general principles of pleadings, such informality is waived by the appearance and answer of defendants.<sup>4</sup> Nor will a dissolution be allowed because of defects in the original bill which have been cured by a supplemental bill, which does not change the cause of action and which shows sufficient ground for continuing the injunction.<sup>5</sup> But an irregularity in granting an injunction;

<sup>1</sup> *Livingston v. Gibbons*, 5 Johns. Ch., 250.

<sup>2</sup> *Bartholomew v. Harwinton*, 33 Conn., 408.

<sup>3</sup> *Corey v. Voorhies*, 1 Green Ch., 5.

<sup>4</sup> *Brammer v. Jones*, 8 Fish., 340; S. C., 2 Bond, 100; *District Township of Lodomillo v. District Township of Cass*, 54 Iowa, 115.

<sup>5</sup> *Conover v. Ruckman*, 34 N. J. Eq., 293.

consisting in non-compliance with the statute requiring notice of the application, is not waived by a motion of some of the defendants to dissolve the injunction because irregularly granted; since, although such motion is perhaps unnecessary, it is still proper to move to dissolve because the order was made contrary to the statute.<sup>1</sup>

§ 1490. Want of diligence on the part of complainant in prosecuting his cause may, as we have already seen, afford ground for dissolving an injunction. Yet it is to be observed that the rule is applicable only where defendant is so situated that he can not expedite the cause himself. If, therefore, defendant is in such a position that he can proceed, the reason for the rule no longer exists and the rule itself falls: *cessat ratio, cessat ipsa lex*.<sup>2</sup> And when the motion to dissolve is based upon the allegation of a want of equity in the bill, no answer having been filed, if the equity of the bill is abundant and there is a clear necessity for the injunction to protect a clear right of the plaintiff, the injunction should not be dissolved because of delay in prosecuting the suit, unless such delay amounts to gross negligence upon the part of plaintiff.<sup>3</sup>

§ 1491. If the question involved on an application for a dissolution is not a question of fact, but one of law, as, for example, concerning the legal interpretation and construction to be placed upon certain mining rights, which from their nature are such that the answer can not deny the equity of the injunction, so as to bring the case within the established rule to entitle complainant to a dissolution, the motion will be refused, although the injunction may be modified to meet the exigencies of the case.<sup>4</sup> But the party in whose favor an injunction has been granted may at any time withdraw it, and its discontinuance depends entirely upon his pleasure.<sup>5</sup>

<sup>1</sup> Wilkie v. Rochester & S. L. R. Co., 12 Hun, 242.

<sup>2</sup> Schermerhorn v. Merrill, 1 Barb., 511.

<sup>3</sup> Scarlett v. Hicks, 18 Fla., 814.

<sup>4</sup> Boston F. Co. v. New Jersey Zinc Co., 2 Beas., 215.

<sup>5</sup> Duckett v. Dalrymple, 1 Rich. Law, 148.



§ 1492. When a proper ground for the injunction is admitted by the answer, or sufficient equity is conceded by the answer as a foundation for the writ, and there yet remains an unsettled dispute between the parties, the injunction will not be dissolved, but will be continued until the hearing or further order of the court.<sup>1</sup> Nor is the plea of the statute of limitations, in the answer, sufficient cause to entitle defendant to a dissolution.<sup>2</sup>

§ 1493. While the verification of an injunction bill by the oath of complainant, or other person cognizant of the facts, is always requisite, yet if there are several complainants, the oath of any one of them will suffice. It follows, therefore, that an injunction will not be dissolved on the ground that one only of several complainants has sworn to the truth of the averments in the bill, since the oath of any one of several joint complainants is sufficient to meet the requirements of the rule.<sup>3</sup>

§ 1494. Where an interlocutory injunction is granted, but the court afterward sustains a demurrer to the bill and dissolves the injunction, plaintiff refusing to amend and permitting judgment to go against him on demurrer, there is no error in such action of the court; since, the demurrer being sustained, there is nothing left to support the injunction.<sup>4</sup>

§ 1495. Upon an application to dissolve an injunction it is proper for the court to balance the relative convenience and inconvenience which would arise from its continuance or its dissolution; and if, upon weighing such considerations, the continuance of the injunction is likely to work more mischief than would result from its dissolution, it is proper to grant the motion to dissolve.<sup>5</sup> Nor will an injunction be maintained when it is manifest that its continu-

<sup>1</sup> Chase v. Manhardt, 1 Bland, 333.

<sup>4</sup> Clark v. Town of Noblesville,

<sup>2</sup> Hutchins v. Hope, 12 Gill & J., 44 Ind., 83.

245.

<sup>5</sup> Attorney-General v. Mayor of

<sup>3</sup> Hemphill v. Ruckersville Bank, Liverpool, 1 Myl. & Cr., 171.  
8 Ga., 435.

ance would be useless. Where, therefore, it is shown that the acts, the performance of which it is sought to enjoin, were actually performed before the order for the injunction was made or served, the injunction will be dissolved.<sup>1</sup>

§ 1496. It is not error to dissolve an injunction when plaintiff has failed to comply with the requirement as to the filing of the necessary bond before the issuing of the writ.<sup>2</sup> So when the injunction is granted upon a bill which is not sworn, and without giving the bond required by statute, a dissolution may properly be allowed.<sup>3</sup>

§ 1497. The practice sometimes prevails of permitting the dissolution of an injunction upon defendant giving bond for the security of plaintiff; and the granting or refusing an application to dissolve upon giving such bond is a matter resting in the sound judicial discretion of the court itself.<sup>4</sup> And where, under the laws of the state, the judge is empowered in his discretion to dissolve an injunction upon the giving of a bond for that purpose, and in the exercise of such discretion he refuses the application, *mandamus* will not lie to compel him to grant the dissolution.<sup>5</sup>

§ 1498. It is within the discretion of a court of equity to substitute an indemnifying bond in lieu of an interlocutory injunction, and it may properly dissolve the injunction upon the giving of such bond by defendants when the ends of justice will be thereby promoted.<sup>6</sup> Where defendant, who was enjoined from disposing of certain property, offered by his answer to return the property to the amount of the indebtedness which he admitted, it was held proper to dissolve the injunction upon defendant making such return and giving a satisfactory bond to abide by and per-

<sup>1</sup> Delger v. Johnson, 44 Cal., 182.

<sup>2</sup> Rosenfield v. Gilmore, 32 Tex., 659.

<sup>3</sup> Gaskins v. Peebles, 44 Tex., 390.

<sup>4</sup> State v. Judge of Superior District Court, 29 La. An., 360.

<sup>5</sup> State v. Judge of Eighth District Court, 23 La. An., 766.

<sup>6</sup> Northern Pacific R. Co. v. St. Paul, M. & M. R. Co., 2 McCrary, 260; S. C., 4 Fed. Rep., 688. And see New Orleans W. Co. v. Oser, 36 La. An., 918; State v. Debaillon, 37 La. An., 110.

form the decree of the court.<sup>1</sup> And where an injunction has been granted in aid of an alleged legal right, which is not established at law and is denied by defendants and is open to doubt, and the injunction interferes with the exercise of a *prima facie* legal right on the part of defendants, and is not required to protect plaintiffs against irreparable mischief, it is proper to dissolve the injunction upon condition of defendants keeping an account, when plaintiffs' rights may be as well protected by that course.<sup>2</sup> But, while the courts sometimes impose the performance of certain acts as a condition of dissolving an injunction, an order granting a dissolution unless the parties will submit their controversy to arbitration under the statutes of the state, and will consent to waive an appeal from the judgment of the court below upon such arbitration, is an excess of judicial authority which is wholly inequitable and will not be sustained.<sup>3</sup>

§ 1499. If the object sought by a preliminary injunction is to prevent any transfer or disposition of the property in controversy until a final decree, such injunction serves its whole purpose in being obeyed until the decree; and when, in such case, the final decree disposes of the entire question and gives the relief prayed by the bill with regard to the disposition of the property in controversy, no order dissolving the interlocutory injunction is necessary to give effect to the final decree.<sup>4</sup>

§ 1500. As regards the parties who are entitled to be heard upon a motion to dissolve, it is held that where the injunction is obtained against trustees the *cestuis que trust* can not be heard if they are not parties to the litigation.<sup>5</sup>

§ 1501. The granting of a motion to dissolve is not conclusive upon the right to an injunction, and can not, there-

<sup>1</sup> *Jewett v. Dringer*, 12 C. E. Green, 271.

<sup>3</sup> *Sobey v. Thomas*, 37 Wis., 568.

<sup>4</sup> *Musgrave v. Staylor*, 38 Md., 123.

<sup>2</sup> *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 3 Mac. & G., 70.

<sup>5</sup> *Ball v. Tunnard*, 6 Madd. (1st American Edition), 170.

fore, be pleaded as *res judicata* upon the right to an injunction, at the final hearing. The effect of sustaining such motion is only to determine that, upon the showing then made, plaintiffs were not entitled to an interlocutory injunction, and the order is in no sense a bar to a perpetual injunction upon full proof at the final hearing.<sup>1</sup> If, however, the injunction is made perpetual at the hearing, by the final judgment in the cause, that judgment becomes *res judicata*, and the court can not afterward sustain a motion to dissolve and award damages thereon.<sup>2</sup> But the dissolution of an interlocutory injunction granted by an inferior court, without a dismissal of the bill, constitutes no bar to obtaining relief in a superior court upon the same equities.<sup>3</sup>

§ 1502. As regards the effect of removing a cause from the state courts to those of the United States, upon an injunction already granted by the state tribunal, the construction given to the former acts of Congress governing removals was that the removal operated *ipso facto* as a dissolution of the injunction, and that no motion for a dissolution was necessary.<sup>4</sup> But by the act of Congress now in force it is expressly provided that all injunctions, orders and other proceedings which may be had in the cause prior to its removal, shall continue in force until modified or dissolved by the United States court into which the cause is removed.<sup>5</sup> But when the cause has been removed into the United States court, and a motion is then made to dis-

<sup>1</sup> Fisher v. Beard, 40 Iowa, 625.

<sup>2</sup> Bloss v. Tacke, 59 Mo., 174. In Samis v. King, 40 Conn., 298, it is said that the reversal by the Supreme Court of a decree granting a permanent injunction does not impair or do away with a temporary injunction granted by the court below in the same cause, but that it remains in full force until dissolved in due course of law. But in this case the reversal was because of a misjoinder of parties,

and the cause was remanded in order that the missing party might be supplied.

<sup>3</sup> Roberts v. Jordans, 3 Munf., 488.

<sup>4</sup> McLeod v. Duncan, 5 McLean, 342; Hatch v. Chicago, R. I. & P. R. Co., 6 Blatch., 105; Northwestern Distilling Co. v. Corse, 4 Biss., 514. But see Carrington v. Florida R. Co., 9 Blatch., 408.

<sup>5</sup> United States Revised Statutes, § 646.

solve the injunction upon the same papers upon which it was originally granted in the state court, such motion is regarded as in effect an application for a re-argument of the motion before the state court, and will not be entertained without leave of court being first had to make the application.<sup>1</sup>

§ 1503. The English rule is, that where an injunction is granted until a given day, or until the further order of the court, it is not to be understood as extending beyond the day named, or until further order, but is to cease at an earlier day if the court shall so order; and such an injunction dissolves itself upon the day named, if not continued by the court.<sup>2</sup> In this country, however, it is held that when an interlocutory injunction is granted until a certain day, or until further order, if no order is made upon the day named the injunction does not expire upon that day, but continues until actually dissolved by the court.<sup>3</sup> But when the injunction is merely ancillary to the principal relief sought and is in terms granted until the further order of the court, it is regarded as abrogated by the final judgment of the court granting the principal relief sought by the action and making no provision for continuing the injunction. Nor is this result changed by the fact that defendant has appealed from the final judgment.<sup>4</sup>

§ 1504. A court of equity may use its power over an injunction for the purpose of compelling plaintiff to reasonably speed his cause, and may order that he set down the cause for hearing, or that the injunction stand dissolved.<sup>5</sup>

<sup>1</sup> *Carrington v. Florida R. Co.*, 9 Blatch., 468.

<sup>2</sup> *Bolton v. London School Board*, 7 Ch. D., 766.

<sup>3</sup> *Bradford v. Peckham*, 9 R. I., 250.

<sup>4</sup> *Gardner v. Gardner*, 87 N. Y., 14.

<sup>5</sup> *Caird v. Campbell*, 1 Mol., 484.

## II. DISSOLUTION UPON ANSWER.

- § 1505. Injunction dissolved on answer denying plaintiff's equities.
1506. The rule illustrated.
1507. Denial upon information and belief.
1508. Exceptions to the general rule.
1509. Further exceptions.
1510. Injunction retained in cases of doubt.
1511. Retained when defendant not prejudiced.
1512. Further exceptions.
1513. Denial must be full and unequivocal.
1514. Denial must be based on actual knowledge.
1515. Further requisites of answer.
1516. Effect of plaintiff's laches.
1517. Denial in part.
1518. Insufficient answer.
1519. Answer by corporation.
1520. Injunction until coming in of answer; reviving injunction.
1521. Evasive answer insufficient.
1522. Injunctions in aid of discovery.
1523. Pendency of exceptions to answer.
1524. Further exceptions to the general rule.
1525. Bill upon information and belief.
1526. Want of probable cause; plaintiff's right supported by evidence.
1527. Waiver of answer under oath.

§ 1505. Upon motion to dissolve an injunction on bill and answer, the answer, in so far as it is responsive to the bill, is taken as true.<sup>1</sup> And it is a well settled rule that when the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's equities rest, the injunction will be dissolved.<sup>2</sup> And

<sup>1</sup> *Harris v. Sangston*, 4 Md. Ch., 394; *Myers*, *ib.*, 183; *Taylor v. Dickinson*, 15 Iowa, 483; *Hatch v. Daniels*,

<sup>2</sup> *Couch v. Ulster Turnpike Co.*, 1 Halst. Ch., 14; *Washer v. Brown*, 4 Johns. Ch., 26; *Hollister v. Barkley*, 9 N. H., 230; *Armstrong v. Sanford*, 7 Minn., 49; *Pineo v. Hefelinger*, 29 Minn., 183; *Caulfield v. Curry*, 63 Mich., 594; *Blum v. Loggins*, 53 Tex., 121; *Moore v. Steelman*, 80 Va., 331; *Anderson v. Reed*, 11 Iowa, 177; *Stevens v. Edwards*, 3 Md., 99; *Schoeffler v. Schwarting*, 17 Wis., 30; *Roberts v. Anderson*, 2 Johns. Ch., 202;

where it is shown by a special plea that there is no equity in the bill, the result, so far as regards the motion to dissolve, is the same as if the allegations of the bill were fully denied by answer.<sup>1</sup> It is to be observed, however, that the rule requires positive averments in the answer, and not mere general allegations of denial based on information and belief.<sup>2</sup> In other words, the denial must be of the same positive character as the averments in the bill on which complainant's equities are based, and where in the bill material facts are positively averred, a denial in the answer of sufficient knowledge on which to form a belief does not meet the requirements of the rule.<sup>3</sup> But where the allegations of the answer are full and responsive to the bill, and fully deny its equity, the injunction will be dissolved unless apparent irreparable mischief is likely to ensue from its dissolution, or unless some peculiar circumstances exist to warrant a departure from the rule.<sup>4</sup> And for the purposes of the rule under discussion, it is only necessary that the answer should deny such facts as constitute the equity of the bill.<sup>5</sup>

§ 1506. In conformity with the general rule, an injunction against proceedings at law, obtained on the ground of fraud, will be dissolved where the answer fully and clearly disproves all fraud and shows a *bona fide* indebtedness and full consideration for the judgment, and it not appearing that the suits, although several in number, are malicious or vexatious.<sup>6</sup> So an injunction to a judgment at law will be

Kaighn v. Fuller, 1 McCart., 419; Magnet M. Co. v. Page & P. S. M. Co., 9 Nev., 347; Brewer v. Day, 8 C. E. Green, 418; Keron v. Coon, 11 C. E. Green, 26; Woodfin v. Beach, 70 N. C., 455; Perry v. Michaux, 79 N. C., 94; Stilt v. Hilton, 3 Stew., 579; Voshell v. Hynson, 26 Md., 83; Rhodes v. Lee, 32 Ga., 470; Foxworth v. Magee, 48 Miss., 532; Barr v. Collier, 54 Ala., 39.

<sup>1</sup>Eldred v. Camp, Harring. (Mich.), 162. See also Hiller v. Collins, 63 Cal., 235.

<sup>2</sup>Doub v. Barnes, 4 Gill, 1; Attorney-General v. Oakland County Bank, Walk. (Mich.), 90.

<sup>3</sup>Smith v. Appleton, 19 Wis., 468.

<sup>4</sup>Satterfield v. John, 53 Ala., 127.

<sup>5</sup>Marvel v. Ortlip, 3 Del. Ch., 9.

<sup>6</sup>Jackson v. Darcy, Saxt., 194.

dissolved upon the coming in of the answer fully denying complainant's equity, except as to one point on which defendant is ignorant, and which is not charged by the bill to be within his knowledge, every other allegation upon which complainant's equity rests being fully and positively denied.<sup>1</sup> And when an injunction is granted against the prosecution of an action of replevin upon the ground of fraud, it will be dissolved upon answer of the defendants denying all fraud. Nor does it afford any objection to the dissolution in such case that there are pleas to the bill still undisposed of, when no advantage was taken of that point in the court below upon the motion to dissolve.<sup>2</sup>

§ 1507. The rule requiring the averments of the answer to be positive, and not upon information and belief, is occasionally relaxed where, from the nature of the case, the defendant can not deny the allegations of the bill upon his own personal knowledge. Thus, where the answer is by the administrator of one who was a party to the contract out of which the alleged equities arose, and it denies those equities upon information and belief, such denial, if sustained and strengthened by some of the allegations of the bill, and if in itself consistent and probable, will warrant a dissolution of the injunction.<sup>3</sup> And it has been held that where plaintiff neglects to make party defendant one who is personally cognizant of all the facts and who should be joined as a party, defendants having no personal knowledge of the equities of the bill are entitled to a dissolution upon their answer denying those equities upon information and belief.<sup>4</sup> But in the absence of such circumstances tending to strengthen the averments of the answer of a defendant, who, from his representative character as an executor or administrator, can have no personal knowledge of the facts;

<sup>1</sup> *Capehart v. Mhoon*, Busb. Eq., 188; *Coale v. Chase*, 1 Bland, 136. 30. But see, *contra*, *Williams v. Stevens' Adm'r*, 1 Halst. Ch., 119.

<sup>2</sup> *Foxworth v. Magee*, 48 Miss., 532.

<sup>4</sup> *De Groot v. Wright*, 3 Halst. Ch., 576.

<sup>3</sup> *Clayton v. Lyle*, 2 Jones Eq.,



his denial upon information and belief will not warrant a dissolution where the equities of the bill are positively charged.<sup>1</sup>

§ 1508. To the general rule that a preliminary injunction will be dissolved on the coming in of the answer fully denying the equities of the bill, there are numerous exceptions, based upon recognized principles of equity, which may not inappropriately be noticed in this connection. And, in the first place, it is to be constantly borne in mind that the dissolution, like the granting of interlocutory injunctions, is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration. A dissolution, therefore, does not follow necessarily and of course upon the coming in of the answer denying the material allegations of the bill upon which the injunction issued, and the court may, in the exercise of a sound judicial discretion, refuse a dissolution and continue the injunction to the hearing, where the circumstances of the case seem to demand this course.<sup>2</sup> Especially will this discretion be exercised where fraud is the *gravamen* of the bill,<sup>3</sup> or where it is apparent to the court that a dissolution

<sup>1</sup> Powell v. Brown, 22 Ga., 275.

<sup>2</sup> Chetwood v. Brittan, 1 Green Ch., 438; Irick v. Black, 2 C. E. Green, 189; Firmstone v. DeCamp, 2 C. E. Green, 309; Shellman v. Scott, Charl. R. M., 380; Albany City Bank v. Schermerhorn, Clarke Ch., 303; Attorney-General v. Oakland County Bank, Walk. (Mich.), 90; Orr v. Littlefield, 1 Woodb. & M., 13; Linton v. Denham, 6 Fla., 533; Hayden v. Thrasher, 20 Fla., 715; Blackwell M. Co. v. McElwee, 94 N. C., 425; Walker v. Stone, 70 Iowa, 103; Kelley v. Briggs, 58 Iowa, 332; Friedlander v. Ehrenworth, 58 Tex., 350; Kahn v. Kerngood, 80 Va., 342; Jenkins v. Walker, 80 Va., 668; Hoagland v. Titus, 1 McCart., 81; Holt v. Bank of Au-

gusta, 9 Ga., 552; Dent v. Summerlin, 12 Ga., 5; Hammett v. Christie, 21 Ga., 251; New v. Bame, 10 Paige, 502; Dey v. Dey, 8 C. E. Green, 88; Murray v. Elston, 8 C. E. Green, 127; Cregar v. Creamer, 12 C. E. Green, 281; Snyder v. Seeman, 41 N. J. Eq., 405; Owen v. Brien, 2 Tenn. Ch., 295; DeGodey v. Godey, 39 Cal., 157; McCreery v. Brown, 42 Cal., 457.

<sup>3</sup> Dent v. Summerlin, 12 Ga., 5; Mulock v. Mulock, 11 C. E. Green, 461; Stewart v. Johnston, 44 Iowa, 435; Brigham v. White, 44 Iowa, 677; Johnston v. C., M. & St. P. R. Co., 58 Iowa, 537; Walker v. Stone, 70 Iowa, 103; Hayden v. Thrasher, 20 Fla., 715; Rigsbee v. Town of Durham, 98 N. C., 81; Friedlander

of the injunction would result in greater injury and hardship than its continuance to the hearing,<sup>1</sup> or where it is apparent that by the dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause.<sup>2</sup> And a court of last resort will be loath to disturb the action of the court below in thus denying a motion to dissolve, unless an abuse of its discretion is shown.<sup>3</sup>

§ 1509. In the exercise of this discretion, a dissolution will not be allowed where auxiliary evidence of complainant's right is before the court, sufficient to sustain the bill, even though its material averments be denied by the answer.<sup>4</sup> And where the facts and entire history of the case, as disclosed by bill and answer, afford strong presumption that complainant will establish his claim for relief upon the hearing, and that he might in the meantime suffer irremediable injury by the dissolution, the injunction will be retained.<sup>5</sup> So where the case as presented by the bill is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved.<sup>6</sup> So, too, where the circumstances of the case, as disclosed in the answers of both of two defendants, seem to require that the injunction should

*v. Ehrenworth*, 58 Tex., 350; *Kahn* 302; *Supervisors v. Paxton*, 56  
*v. Kerngood*, 80 Va., 342; *Jenkins* Miss., 679.  
*v. Waller*, 80 Va., 668. See also <sup>3</sup> *DeGodey v. Godey*, 39 Cal., 157;  
*Sinnott v. Moles*, 38 Iowa, 25. *McCreery v. Brown*, 42 Cal., 457.

<sup>1</sup> *Chetwood v. Brittan*, 1 Green <sup>4</sup> *Orr v. Littlefield*, 1 Woodb. &  
 Ch., 438; *Firmstone v. DeCamp*, 2 M., 13; *Conover v. Ruckman*, 34  
 C. E. Green, 309. N. J. Eq., 293.

<sup>2</sup> *Attorney-General v. Oakland* <sup>5</sup> *Linton v. Denham*, 6 Fla., 533;  
*County Bank, Walk. (Mich.)*, 90; *Stees v. Kranz*, 32 Minn., 313.

*Fargo v. Ames*, 45 Iowa, 494; *Si-* <sup>6</sup> *Hoagland v. Titus*, 1 McCart.,  
*mon v. Townsend*, 12 C. E. Green, 81; *Owen v. Brien*, 2 Tenn. Ch.,  
 295.

be continued, it will not be dissolved upon the answers, but will be retained until the hearing.<sup>1</sup>

§ 1510. Where it is apparent from the answer that there are still questions of doubt, on which additional light is requisite to satisfy the court before deciding the rights of the parties, a dissolution should not be granted.<sup>2</sup> Especially is this true where the very purpose for which the relief was originally allowed was the prevention of irreparable injury.<sup>3</sup> Or if a reasonable doubt exists as to whether the equity of the bill is sufficiently negatived by the answer to warrant a dissolution, it is not error for the court to refuse to dissolve the injunction and to order it to stand over that proofs may be taken.<sup>4</sup>

§ 1511. If the continuance of the injunction, even admitting defendant's answer to be true, can not prejudice or imperil his rights, and on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be allowed.<sup>5</sup> Thus, in the case of an injunction in aid of a creditor's bill, the answer of the defendant denying the ownership of any property, or interests in property of any nature whatever, does not necessarily entitle him to a dissolution of the injunction restraining him from disposing of his property. In such case, if the answer be true, the injunction can work no injury to defendant, and if, notwithstanding his answer, he is possessed of property, the injunction should be continued for the protection of the creditors.<sup>6</sup> So where the fact is disclosed by defendants'

<sup>1</sup> *Hammett v. Christie*, 21 Ga., 251. See also *Scott v. Hartman*, 11 C. E. Green, 89; *Ely v. Crane*, 37 N. J. Eq., 157.

<sup>2</sup> *Kuhl v. Martin*, 11 C. E. Green, 60; *Lowe v. Board of Commissioners*, 70 N. C., 532; *Whittaker v. Hill*, 96 N. C., 2; *Caldwell v. Stirewalt*, 100 N. C., 201; *Fargo v. Ames*, 45 Iowa, 494.

<sup>3</sup> *Purnell v. Daniel*, 8 Ired. Eq., 9.

<sup>4</sup> *James v. Lemly*, 2 Ired. Eq., 278; *Monroe v. McIntyre*, 6 Ired. Eq., 65.

<sup>5</sup> *New v. Bame*, 10 Paige, 502; *McCorkle v. Brem*, 76 N. C., 407; *Jones v. Brandon*, 60 Miss., 556.

<sup>6</sup> *New v. Bame*, 10 Paige, 502.

answer that they have no substantial interest in the subject-matter of the action, such interest being in a third person, not a party to the bill, and that the interests of the defendants can not be prejudiced by continuing the injunction, while complainant's rights may be seriously jeopardized, the writ will not be dissolved on such answer.<sup>1</sup>

§ 1512. It is also held that where the injunction is not merely ancillary to some other and principal relief sought by the action, but is itself the principal relief desired, and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution and to continue the injunction to the hearing.<sup>2</sup> So when the questions presented by the bill upon which a preliminary injunction has been granted are novel and important and are awaiting an adjudication in the court of last resort of the state in a litigation between the same parties, a motion to dissolve upon bill and affidavits may properly be denied.<sup>3</sup> And if the question of fact upon which the right to the injunction depends is evenly balanced upon the affidavits on the motion to dissolve, the motion should be denied and the injunction retained until the final hearing.<sup>4</sup>

§ 1513. The rule that an answer fully denying the equities of the bill entitles defendant to a dissolution must be understood as applying only to cases where the answer is properly responsive to the bill and where its denials are explicit and direct, traversing the allegations of fact on which the writ was granted. It is not sufficient that it deny the inferences to be drawn from those facts, or deny their effect, and such an answer does not constitute sufficient ground for a dissolution.<sup>5</sup> Nor will a merely technical or

<sup>1</sup> *James v. Norris*, 4 Jones Eq., 225.

<sup>2</sup> *Lowe v. Board of Commissioners*, 70 N. C., 532; *Marshall v. Commissioners*, 89 N. C., 103.

<sup>3</sup> *Morris & E. R. Co. v. Haskins*, 11 C. E. Green, 295.

<sup>4</sup> *St. Joseph & D. C. R. Co. v. Dryden*, 11 Kan., 186.

<sup>5</sup> *Teasey v. Baker*, 4 C. E. Green, 61; *Coleman v. Hudspeth*, 49 Miss., 562; *Richardson v. Lightcap*, 52 Miss., 508.

equivocal denial meet the requirements of the rule, especially when it is manifest from the entire case that the aid of the court is still necessary for the protection of plaintiffs.<sup>1</sup> And where defendant by his affidavit makes a mere general denial, without traversing all the facts on which plaintiff's equities rest, the injunction will not be dissolved.<sup>2</sup> Or if the answer neither admits nor denies, unless by implication, the positive allegations of the bill, it is proper to refuse a dissolution and to continue the injunction until the hearing.<sup>3</sup> And if the answer is unsatisfactory as to a material equity of plaintiff's case, it is proper to continue the injunction to the hearing.<sup>4</sup> So if it fails to deny material statements of the bill upon which the injunction was granted, the court may refuse to dissolve.<sup>5</sup> Nor will an answer by way of confession and avoidance, as distinguished from a direct traverse, suffice to meet the requirements of the rule.<sup>6</sup> So, too, if the bill asserts a title in plaintiff, for the protection of which the injunction is sought, a dissolution will not be allowed upon an answer which does not fully and positively deny plaintiff's title.<sup>7</sup>

§ 1514. It is also to be borne in mind that the general rule under discussion, by which a dissolution is allowed upon a sworn answer fully denying the equities of the bill, is applicable only when the denials are based upon the actual knowledge of the person denying under oath, and a mere denial upon information and belief will not suffice within the meaning of the rule.<sup>8</sup> And if the equities of

<sup>1</sup> *Merwin v. Smith*, 1 Green Ch., 182; *Woodruff v. Ritter*, 11 C. E. Green, 86.

<sup>2</sup> *Pyecroft v. Pyecroft*, 2 Sm. & Gif., 326.

<sup>3</sup> *Ladies Benevolent Society v. Benevolent Society*, 2 Tenn. Ch., 77.

<sup>4</sup> *Gibby v. Hall*, 12 C. E. Green, 282.

<sup>5</sup> *Large v. Ditmars*, 12 C. E. Green, 283.

<sup>6</sup> *Jackson v. Jackson*, 84 Ala., 343; *Maclary v. Reznor*, 3 Del. Ch., 445.

<sup>7</sup> *Coleman v. Hudspeth*, 49 Miss., 562.

<sup>8</sup> *Higbee v. Camden & A. R. Co.*, 4 C. E. Green, 276; *Pierson v. Ryerson*, 1 Halst. Ch., 196; *Ward v. Van Bokkelen*, 1 Paige, 100; *Tyne v. Dougherty*, 3 Tenn. Ch., 52; *Cole Co. v. Virginia Co.*, 1 Sawy., 685; *Hart v. Clark*, 54 Ala., 490;

the bill are not thus denied upon actual knowledge, they may be taken as true upon the motion to dissolve; and so of every allegation which is neither admitted nor denied by the answer.<sup>1</sup> The answer should also distinguish between what is denied upon personal knowledge and what upon information and belief; and when it is sworn by the solicitor of defendants, who does not claim to have any knowledge or even information of the facts, it will be regarded as the oath of a stranger to the transaction, and will not suffice to dissolve the injunction.<sup>2</sup> And an allegation in the answer that defendant has no knowledge touching a material averment of the bill is insufficient to warrant a dissolution.<sup>3</sup>

§ 1515. To entitle defendants to a dissolution, their answer must be at least credible,<sup>4</sup> and it must be responsive to the material allegations of the bill;<sup>5</sup> otherwise the injunction will be continued to the hearing. And in no event will a dissolution be allowed upon an answer not under oath, and without evidence of the truth of the matters alleged in defense.<sup>6</sup> So to warrant an application of the rule that the injunction will be dissolved upon answer denying the equities of the bill, the answer must be of such a character as to completely counterbalance the case presented by the bill, leaving nothing to inference or presumption. In other words, the denial should be direct and positive, and by one who has personal knowledge of the facts denied. And if the answer is not a satisfactory denial, and is not sufficient to remove reasonable and well

*Miller v. McDougall*, 44 Miss., 682; *Sinnett v. Moles*, 38 Iowa, 25; *Turner v. Cuthrell*, 94 N. C., 239.

<sup>1</sup> *Tyne v. Dougherty*, 3 Tenn. Ch., 52.

<sup>2</sup> *Miller v. McDougall*, 44 Miss., 682. But under the practice in Alabama the court may, notwithstanding the answer is verified only upon information and belief,

entertain a motion to dissolve for want of equity in the bill, and if the bill has no equity the motion will be sustained. *Hart v. Clark*, 54 Ala., 490,

<sup>3</sup> *Gates v. Ballou*, 54 Iowa, 485.

<sup>4</sup> *Moore v. Hylton*, 1 Dev. Eq., 433.

<sup>5</sup> *Rich v. Thomas*, 4 Jones Eq., 71.

<sup>6</sup> *Gray v. McCance*, 11 Ill., 325.

founded doubts in the mind of the court, the injunction may be retained.<sup>1</sup>

§ 1516. A critical examination of the cases wherein a departure has been allowed from the general rule, that defendant is entitled to a dissolution on filing his answer denying the equities of the bill, will show that in every instance the departure has been warranted by special circumstances, appealing strongly to the exercise of a sound judicial discretion, and warranting the court in retaining the injunction, notwithstanding the denial of the averments of the bill, in order that substantial justice might be done between the parties. But such discretion will not be exercised in behalf of one who has been grossly negligent in the assertion of his rights; and where plaintiff has been guilty of great laches, and has allowed an unreasonable length of time to elapse without taking any steps in his cause, the general rule will not be departed from, and the injunction will be dissolved upon the coming in of the answer denying complainant's equities.<sup>2</sup>

§ 1517. If the answer negative only a part of the equity of the bill, it will not suffice to warrant the court in dissolving the injunction, and under such circumstances it will usually be continued to the hearing.<sup>3</sup> Where, however, a discrimination may properly be made, and the injunction may be dissolved in part and retained as to the remainder, if the answer satisfactorily denies a portion of the equity of the bill, a dissolution may be allowed *pro tanto*.<sup>4</sup>

<sup>1</sup> *Sinnett v. Moles*, 38 Iowa, 25. But in *Tainter v. Lucas*, 29 Wis., 375, it is held that the denials in the answer need only be of the same character as the statements in the bill. And the bill alleging that certain municipal officers had acted fraudulently and corruptly in levying a tax, such allegation, however positive in form, could in effect be made only upon informa-

tion and belief; and the action to enjoin the tax being brought against officers not charged with fraud, their answer upon information and belief denying the fraud alleged against the others was held sufficient to warrant a dissolution.

<sup>2</sup> *Greenin v. Hoey*, 1 Stockt., 137.

<sup>3</sup> *Jackson v. Jones*, 25 Ga., 93.

<sup>4</sup> *Edwards v. Perryman*, 18 Ga., 374.

§ 1518. Where defendant's answer is illusory, and is deficient in frankness and candor, the injunction will be retained.<sup>1</sup> Thus, an averment in an answer that certain material facts are substantially correct, so far as concerns the defendants, is defective both in form and substance, and is not sufficient to entitle defendants to a dissolution.<sup>2</sup> So if the answer makes no denial of the averments of the bill on which complainant's equity rests, but simply asserts that defendant does not believe and can not admit them, it is insufficient to warrant a dissolution.<sup>3</sup> And where, after the coming in of the answer, enough of the bill still remains undisputed to render it probable that complainant will sustain his claim for relief, the injunction will not be dissolved.<sup>4</sup> And an injunction which has been granted upon notice and affidavits of both parties, especially upon the affidavits of defendants themselves, going to the merits of the cause, will not be dissolved on answer, but will be continued to the hearing.<sup>5</sup>

§ 1519. Where a corporation is made a defendant in equity, an answer under the corporate seal and without oath is generally sufficient for ordinary purposes, and this is the usual mode of answering by corporate bodies. But for the purposes of a motion to dissolve an injunction, such an answer verified merely by the corporate seal is not sufficient, and the oath of some officer of the corporation, or other person acquainted with the facts alleged in the answer, is also necessary.<sup>6</sup>

§ 1520. A preliminary injunction, granted until the coming in of the answer, or until further order of the court, is not dissolved, *ipso facto*, by the coming in of the answer,

<sup>1</sup> Little v. Marsh, 2 Ired. Eq., 18.

<sup>2</sup> Carr v. Weld, 8 C. E. Green, 41.

<sup>3</sup> Kent v. Ricards, 3 Md. Ch., 392.

<sup>4</sup> Sherrill v. Harrell, 1 Ired. Eq., 194.

<sup>5</sup> Sinnickson v. Johnson, 2 Green Ch., 374.

<sup>6</sup> Fulton Bank v. New York & Sharon Canal Co., 1 Paige, 311; Hemphill v. Ruckersville Bank, 3 Ga., 435; Griffin v. State Bank, 17 Ala., 258. See also Jewett v. Bowman, 12 C. E. Green, 171.



but requires an order for that purpose.<sup>1</sup> It is held, however, that no motion to dissolve is necessary in such a case.<sup>2</sup> But on it being satisfactorily made to appear to a court of equity that an injunction has been irregularly and improperly dissolved, it will be revived.<sup>3</sup> And it may be said generally, that courts of equity are always open to reinstate as well as to grant injunctions.<sup>4</sup> But the fact that an indictment for forgery has been found upon the answer on which a dissolution was allowed does not constitute sufficient ground for reviving the injunction.<sup>5</sup>

§ 1521. An injunction will not be dissolved upon an answer which is evasive as to the material allegations of the bill.<sup>6</sup> Thus, in the case of an injunction restraining defendant from removing his property beyond the limits of the state, if defendant answers evasively as to his intention to remove his property, and also evades the allegation of his insolvency, which was one of the grounds for granting the relief, the injunction will not be dissolved, especially if defendant bases his rights upon a doubtful question of law; in such a case it is the duty of the court to continue the writ until a hearing upon the merits.<sup>7</sup>

§ 1522. Injunctions granted merely for purposes of discovery, and in aid of a defense at law, are usually dissolved upon the filing of the answer. Such injunctions being merely auxiliary in their nature, and only intended to stay proceedings until a discovery is obtained, when this object is accomplished no necessity exists for their further retention, and they are accordingly dissolved on the coming in of the answer.<sup>8</sup> Thus, in the case of an injunction restraining legal proceedings, on a bill for discovery and in aid of

<sup>1</sup> *Turner v. Scott*, 5 Rand., 332; *Orddeen v. Oakley*, 2 DeG., F. & J., 158.

<sup>2</sup> *Beal v. Gibson*, 4 Hen. & M., 481.

<sup>3</sup> *Billingslea v. Gilbert*, 1 Bland, 566. And see *Beal v. Gibson*, 4 Hen. & M., 481.

<sup>4</sup> *Radford's Ex'rs v. Innes' Executrix*, 1 Hen. & M., 8.

<sup>5</sup> *Clapham v. White*, 8 Ves., 35.

<sup>6</sup> *Wilson v. Mace*, 2 Jones Eq., 5; *Forney v. Calhoun Co.*, 84 Ala., 215.

<sup>7</sup> *Wilson v. Mace*, 2 Jones Eq., 5.

<sup>8</sup> *King v. Clark*, 3 Paige, 76; *Grafton v. Brady*, 3 Halst. Ch., 79.

a defense at law, defendant's answer denying the allegations of the bill as to those matters concerning which the discovery is sought, and making no discovery, the injunction will be dissolved.<sup>1</sup> And it has been held that defendant in such a case is entitled to a dissolution, regardless of whether his answer admits or denies the facts charged in the bill.<sup>2</sup>

§ 1523. The pendency of exceptions to the answer will not prevent the court from dissolving the injunction, when the answer fully denies the equities of the bill, and when the exceptions do not affect the matters upon which plaintiff's claim for the injunction is founded.<sup>3</sup>

§ 1524. If the effect of dissolving the injunction upon the coming in of the answer would be to permit defendants to proceed at law for the enforcement of their demand against the fund in litigation, the entire subject-matter and all the parties being within the jurisdiction of the court of equity in the injunction cause, and that court having power to adjust the whole controversy, it is proper to deny the motion to dissolve.<sup>4</sup> So if the bill shows a probable right, and a probable danger to that right without the intervention of the court through its injunction, a dissolution will not ordinarily be allowed upon a pure question of law, unless the question is plain beyond a reasonable doubt. And when such question is not free from difficulty, the better course is to refuse the motion to dissolve and to retain the injunction until the final hearing.<sup>5</sup>

§ 1525. The rule being general and well established that, to warrant an injunction in the first instance, the statements of the bill must be positive and within plaintiff's knowl-

<sup>1</sup> *Grafton v. Brady*, 3 Halst. Ch., 79.

<sup>2</sup> *King v. Clark*, 3 Paige, 76.

<sup>3</sup> *Stitt v. Hilton*, 31 N. J. Eq. (4 Stew.), 285, affirming S. C., 30 N. J. Eq. (3 Stew.), 579. See also *Mitchell v. Mitchell*, 5 C. E. Green, 234. But the rule was different

under the English Chancery practice. See *Howes v. Howes*, 1 Beav., 197; *Williams v. Davis*, 1 Sim. & Stu., 262.

<sup>4</sup> *Mosser v. Pequest Mining Co.*, 11 C. E. Green, 200.

<sup>5</sup> *Nashville Savings Bank v. Mayor*, 3 Tenn. Ch., 388.

edge, or if upon information and belief that they must be supported by the statements of persons cognizant of the facts, it is not error to dissolve an injunction which has been granted in disregard of this rule.<sup>1</sup> And when most of the material allegations of the bill are stated upon information and belief, and these are denied by the answers and affidavits on the part of defendants, the injunction should be dissolved.<sup>2</sup>

§ 1526. Where a motion to dissolve is heard upon bill, answer and depositions used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that plaintiff will be able to make out his case upon final hearing, the injunction will be dissolved.<sup>3</sup> If, however, plaintiff's right to relief is supported by evidence regularly taken in the cause in his behalf, and on which he intends to rely upon the final hearing, the injunction will not be dissolved upon bill and answer alone, but will be ordered to stand over until the hearing.<sup>4</sup>

§ 1527. If plaintiff waives the answer of defendant under oath, while such waiver deprives the answer of its effect as evidence, and dispenses with the necessity which would otherwise exist of disproving it by testimony equivalent to that of two witnesses, yet such answer, if it negatives the equities of the bill, must be treated upon a motion to dissolve as a denial of plaintiff's case. It is proper, therefore, upon such motion to give to such an answer the effect of a sworn denial.<sup>5</sup>

<sup>1</sup> *Lee v. Clark*, 49 Ga., 81.

<sup>4</sup> *Christie v. Griffing*, 9 C. E. Green, 76.

<sup>2</sup> *Cunningham v. Tucker*, 14 Fla., 251.

<sup>5</sup> *Lockhart v. City of Troy*, 48

<sup>3</sup> *Craycroft v. Morehead*, 67 N. C., 422.

*Ala.*, 579. See also *Manchester v. Dey*, 6 Paige, 295.

## III. INJUNCTIONS AGAINST SEVERAL DEFENDANTS.

- § 1528. The general rule.
- 1529. Modifications of the rule.
- 1530. Illustrations.
- 1531. Impossibility of procuring answer.
- 1532. Greater strictness required in cases of fraud.
- 1533. Ignorance; absence of defendant; improper joinder.
- 1534. Further illustrations.
- 1535. Dissolution refused when equities not denied.

§ 1528. The general rule as to the dissolution of injunctions granted against several defendants jointly, is that a dissolution will not be allowed until all the defendants implicated in the charge have fully answered, denying the equities of the bill.<sup>1</sup> The rule is based upon the necessity of protecting the rights of complainant by retaining the injunction until the personal knowledge of all the defendants has been tested as to the facts alleged in the bill, and until this is done complainant has a right to insist upon the protection of the court.<sup>2</sup>

§ 1529. It is to be noticed, however, that the rule as here stated is limited by three important modifications or exceptions. The first of these is that complainant must have used due diligence in taking the necessary steps to expedite his cause and to procure the answers of all the defendants.<sup>3</sup> Equity rarely, if ever, extends its protection to those who have been negligent in the assertion of their rights, and complainants, who have been guilty of laches in compelling the answer of defendants, can not complain if a dissolution is allowed before the answers of all the defendants enjoined have been filed. Thus, where the answers of some

<sup>1</sup> *Noble v. Wilson*, 1 Paige, 164; *Smith v. Loomis*, 1 Halst. Ch., 60; *Johnston v. Alexander*, 6 Ark., 302. See *Prickett v. Tuller*, 29 N. J. Eq. (2 Stew.), 154.

<sup>2</sup> *Coleman v. Gage*, Clarke Ch., 295.

<sup>3</sup> *Mallett v. Weybossett Bank*, 1 Barb., 217; *Depeyster v. Graves*, 2 Johns. Ch., 148; *Stoutenburgh v. Peck*, 3 Green Ch., 446; *Johnston v. Alexander*, 6 Ark., 302; *Noble v. Wilson*, 1 Paige, 164; *Shonk v. Knight*, 12 West Va., 667.

of the defendants were in, and the others could have been obtained by due diligence, but complainant had neglected for a period of nine months to procure them, a dissolution was properly granted.<sup>1</sup> A second modification of the rule is, that the answer is required of those defendants only upon whom rests the *gravamen* of the charge, and where such defendants have fully answered, denying the material allegations of the bill, the injunction may be dissolved, notwithstanding other defendants have not yet answered.<sup>2</sup> Thus, the answer of defendants who are joined merely as formal or nominal parties to the action will not be insisted upon, since such answer can not vary or alter the effect of the answers of the real defendants in interest, nor deprive them of their right to a dissolution upon negating the equities of the bill.<sup>3</sup> So where it is apparent upon the face of the answer itself that all the defendants who have any personal knowledge of the matters in controversy have answered, denying the allegations of the bill, and that the defendant not answering is ignorant of the facts in issue, the injunction should be dissolved.<sup>4</sup> Nor does it matter that the answer in such case contains new matter in addition to that in denial, provided all the material averments of the bill are clearly denied.<sup>5</sup> And when one of two defendants who are enjoined is a mere stakeholder of the fund in controversy, having no interest therein, the right to such fund being litigated between his co-defendant and the plaintiff, the injunction may be dissolved upon the

<sup>1</sup>Depeyster v. Graves, 2 Johns. Ch., 148.

<sup>2</sup>Higgins v. Woodward, Hopk., 342; Seebor v. Hess, 5 Paige, 85; Depeyster v. Graves, 2 Johns. Ch., 148; Vliet v. Lowmason, 1 Green Ch., 404; Stoutenburgh v. Peck, 3 Green Ch., 446; Mallett v. Weybossett Bank, 1 Barb., 217; Adams v. Hudson County Bank, 2 Stockt., 535; Heck v. Vollmer, 29 Md., 507; Coleman v. Gage, Clarke Ch., 295;

Johnston v. Alexander, 6 Ark., 302; Fowler v. Williams, 20 Ark., 641; Shricker v. Field, 9 Iowa, 366; Shonk v. Knight, 12 West Va., 667; Douglass v. County Commissioners, 23 Fla., 419.

<sup>3</sup>Higgins v. Woodward, Hopk., 342; Shricker v. Field, 9 Iowa, 366.

<sup>4</sup>Coleman v. Gage, 1 Clarke Ch., 295.

<sup>5</sup>Shricker v. Field, 9 Iowa, 366.

answer of the contesting defendant denying the equities of the bill, even though a decree *pro confesso* has been taken against the nominal defendant.<sup>1</sup> The third recognized modification of the rule is, that it is applicable only to cases where the injunction was properly granted in the first instance.<sup>2</sup>

§ 1530. If one of several defendants enjoined answers with a full denial of the material allegations contained in the bill, and another denies all knowledge, information and belief of the matters in controversy, the injunction may be dissolved, without waiting for the answer of a third defendant who can know nothing of the equities of the bill.<sup>3</sup> But where, upon filing a bill, an injunction is allowed against one of several defendants, it will not be dissolved upon his answer negating complainant's equities, if the other defendants by their answers admit all the material allegations of the bill.<sup>4</sup> Where, however, one of the defendants files his answer, and from his own connection with the subject in controversy, and of his own personal knowledge, is able to lay such facts before the court as to render it apparent that complainant has no equity, a motion to dissolve may be granted, without the answer of the other defendant.<sup>5</sup>

§ 1531. Where from the circumstances of the case it is impossible to procure the answer of all the defendants, those who have answered denying the equities on which the injunction rests are entitled to a dissolution without further delay. Thus, where the defendant that has not answered is a foreign corporation, not within the jurisdiction of the court, and it is therefore impossible to compel an answer from such defendant, the absence of its answer is not sufficient ground for refusing to dissolve the injunction.<sup>6</sup>

<sup>1</sup> Colton v. Price, 50 Ala., 424.

<sup>4</sup> Zabriskie v. Vreeland, 1 Beas.,

<sup>2</sup> Mallett v. Weybossett Bank, 1

179.

Barb., 217. And see Depeyster v. Graves, 2 Johns. Ch., 148; Vliet v. Lowmason, 1 Green Ch., 404.

<sup>5</sup> Gregory v. Stillwell, 2 Halst. Ch., 51.

<sup>6</sup> Baltimore & Ohio R. R. v. Wheeling, 18 Grat., 40.

<sup>3</sup> Rockwell v. Lawrence, 1 Halst. Ch., 20.

§ 1532. Courts of equity are usually more strict in requiring a positive denial from all the defendants before dissolving an injunction granted on the ground of fraud, than in ordinary cases. And where the bill implicates two defendants in the same charge of fraudulent conduct, the court will require the answer of both defendants before granting a motion to dissolve.<sup>1</sup> So where the answer of one of the defendants is not sufficiently full and satisfactory as to the acceptance and subsequent fraudulent relinquishment of a trust, which constituted one of the chief grounds on which the injunction was granted, it will not be dissolved, even though there are no other reasons for retaining it.<sup>2</sup> And where fraud is one of the grounds upon which the injunction was granted, a denial on the part of some of the defendants of fraud as to themselves will not authorize a dissolution, if their title or rights may be affected by the fraud charged against the other defendants.<sup>3</sup>

§ 1533. Mere ignorance of the subject in controversy on the part of the defendants answering the bill, and their consequent inability to deny the material averments on which its equity depends, will not warrant the court in dissolving the injunction. Nor does the fact that the only defendant who can answer such allegations is absent from the state constitute any ground of exception to the general rule, and the injunction will, under such circumstances, be retained to the hearing.<sup>4</sup> And on motion to dissolve an injunction against proceedings at law, the fact that a third person, not a party to the action at law, and improperly made a defendant in the injunction suit, was enjoined, will not avail the defendant seeking a dissolution.<sup>5</sup>

§ 1534. Where the officers of a corporation are joined with it as co-defendants in a bill for a discovery and for an injunction against an action brought by the corporation,

<sup>1</sup> Price v. Clevenger, 2 Green Ch., 207.

<sup>2</sup> Scull v. Reeves, 2 Green Ch., 84.

<sup>3</sup> Schermerhorn v. Merrill, 1 Barb., 511.

<sup>4</sup> Lines v. Spear, 4 Halst. Ch., 154; Council v. Walton, 4 Ired.

Eq., 155.

<sup>5</sup> Tradesman's Bank v. Merritt, 1 Paige, 302.

the injunction may be dissolved upon the coming in of the answer of the corporation, although its officers have not yet answered.<sup>1</sup> So when an injunction is obtained against several defendants restraining them from prosecuting a joint action at law, some of whom answer and obtain a dissolution as to themselves, and the others afterward file their answer but neglect to move to dissolve, those who have already procured the dissolution as to themselves may have the injunction dissolved as to their co-defendants.<sup>2</sup>

§ 1535. If the equities of the bill are not denied by the answers of defendants, who have no personal knowledge of those equities, one of them being a trustee and the others executors of a deceased testator with whom the original transaction was had, it is improper to dissolve the injunction upon their answers.<sup>3</sup>

<sup>1</sup> *Glasscott v. Copper Miners Co.*, Sim., 365. See also *Joseph v. 11 Sim.*, 305. *Doubleday*, 1 Ves. & B., 497.

<sup>2</sup> *Macgregor v. Cunningham*, 16      <sup>3</sup> *Hooker v. Austin*, 41 Miss., 717.



## IV. INJUNCTIONS AGAINST PROCEEDINGS AT LAW.

§ 1536. Effect of dissolution.

1537. Dissolution refused before hearing where right is founded in trust.

1538. Dissolution in part.

1539. Credits allowed on judgment.

1540. Effect of defendant declining to answer.

1541. Error to enter decree for amount of judgment on dissolution; costs.

§ 1536. The effect of a decree dissolving an injunction against the enforcement of an execution at law is to restore the execution creditor to the same position which he occupied before the granting of the writ, and he may proceed to enforce his execution as if no injunction had been granted.<sup>1</sup> Nor does an appeal from such a decree operate as a stay of execution or revive the injunction, and the creditor is at liberty to proceed with the collection of his execution, notwithstanding such appeal, as if he had never been enjoined.<sup>2</sup>

§ 1537. While no principle of the law of injunctions is better established than that he who has a good defense to an action at law, which he omits or fails to make in the legal forum, can not afterward make such defense the foundation of a bill in equity to enjoin the proceedings at law, yet where an injunction has been granted against such proceedings, it will not be dissolved before the hearing, where complainant's right to relief rests on matters of trust of purely equitable jurisdiction.<sup>3</sup> And where a suit at law has been enjoined in order that the defendant in the action might obtain relief and discovery by changing the forum of litigation, if the subject-matter is peculiarly of equitable cognizance, making it proper for a court of equity to retain jurisdiction of the case, the injunction will not be dissolved

<sup>1</sup> *Duckett v. Dalrymple*, 1 Rich. 139; *Wood v. Dwight*, 7 Johns. Ch., Law, 143. 295.

<sup>2</sup> *Garrow v. Carpenter*, 4 Stew. & <sup>3</sup> *Quackenbush v. Van Riper*, P., 336; *Hoyt v. Gelston*, 13 Johns., Saxt., 476.

on the coming in of the answer, denying the equities of the bill.<sup>1</sup>

§ 1538. Injunctions granted against judgments at law may be dissolved in part and retained until a hearing as to the residue, where the circumstances of the case are such as to clearly require this course in order to promote justice and secure the rights of all parties. Thus, an injunction to a judgment at law, where the answer admits a part of the judgment to have been paid, should not be made perpetual, upon a motion to dissolve, even as to the part paid, but should be continued to the hearing as to the amount admitted to be paid, and dissolved as to the residue.<sup>2</sup> And under the English practice, an injunction restraining several defendants from proceedings at law may be dissolved as against some of them, before all have answered.<sup>3</sup>

§ 1539. An injunction restraining proceedings under a judgment at law on the ground that the judgment is for an amount larger than that really due, will not be continued on defendant's allowing a credit for the amount of the excess; and the answers showing positively that the balance of the judgment is justly due, the motion to dissolve will be granted.<sup>4</sup> And where proceedings at law are enjoined on the ground of certain credits which have not been allowed, if the defendant admits the credits by his answer and offers to allow them, the injunction will be dissolved as to the balance justly due.<sup>5</sup>

§ 1540. If defendant declines answering the injunction bill, he is regarded, on the motion to dissolve, as admitting its allegations. It is therefore error to dissolve an injunction against a judgment at law where the bill contains upon its face sufficient equity to warrant the writ, as where it appears that the judgment has been discharged by proceedings in bankruptcy, and defendant declines to answer.<sup>6</sup>

<sup>1</sup> *Brown v. Edsall*, 1 Stockt., 256.

<sup>4</sup> *Rodahan v. Driver*, 23 Ga., 352.

<sup>2</sup> *McReynolds v. Harshaw*, 2  
Ired. Eq., 29.

<sup>5</sup> *Welch v. Parran*, 2 Gill, 320.

<sup>3</sup> *Lewis v. Smith*, 7 Beav., 470.

<sup>6</sup> *Peatross v. McLaughlin*, 6  
Grat., 64.

§ 1541. In the absence of any statute authorizing such a course, it is error for a court of equity, in dissolving an injunction granted to restrain proceedings under a judgment at law, to enter a decree in favor of the plaintiff at law for the amount of the judgment enjoined, with damages and interest, the proper practice in such case being to dissolve the injunction and dismiss the bill with costs.<sup>1</sup> But when an interlocutory injunction is obtained against judgments at law upon the ground that they are paid, and the injunction is perpetuated upon the hearing as to a judgment which was paid but dissolved as to others not paid, it is a proper exercise of judicial discretion to decree the costs of the litigation against plaintiff in the injunction suit.<sup>2</sup>

<sup>1</sup> *Medley v. Pannill's Adm'r*, 1 Rob. (Va.), 63.      <sup>2</sup> *Howard v. Bennett*, 72 Ill., 297.

## V. INJUNCTIONS AFFECTING REALTY.

- § 1542. Diligence exacted of complainant.  
1543. Injunction retained in case of doubt.  
1544. Injunction against judgment for unpaid purchase money.  
1545. The same.  
1546. Illustrations.

§ 1542. The general rule exacting diligence from one who seeks the extraordinary aid of equity for the protection of his rights prevails very strongly where an injunction is granted for the protection of property, pending litigation concerning the right or title in dispute. And where a person has received the aid of a court of equity by injunction for the purpose of protecting him in the property in dispute, until the questions at issue shall be determined, he will not be allowed to slumber on his rights, and if he fails to exercise reasonable diligence in advancing his suit, the injunction will be dissolved.<sup>1</sup> Long acquiescence on the part of a complainant in alleged acts of fraud, which constitute the foundation of his injunction, and unreasonable delay in invoking the aid of the court for the protection of his rights, will warrant the court in dissolving the injunction. Thus, where an injunction has been obtained on the ground of fraud in certain conveyances, but it appears by the answer that complainants had long been aware of the pretended fraud, and had allowed defendants to proceed without molestation, and to exercise acts of ownership and mortgage the premises, the motion to dissolve will be granted.<sup>2</sup>

<sup>1</sup> *Schalk v. Schmidt*, 1 McCart., 268. That the rule, however, is not without exception is indicated by the following observations of the court: "There are exceptions to the general rule, but they will be found to consist either of cases where the party enjoined is the mere solicitor, or agent, or tenant

of a party to the suit, having no rights involved in the controversy, or where the right has been already determined. *Cholmondeley v. Clinton*, 19 Vesey, 261; *Attorney-General v. Ancaster*, Dick., 68; *Casa-major v. Strode*, 1 Sim. & St., 381."

<sup>2</sup> *Trustees v. Gilbert*, 1 Beas., 78.

§ 1543. The existence of doubt as to whether real estate is properly subject to sale under execution constitutes sufficient ground to warrant a court in retaining an injunction against the sale. Thus, in the case of an injunction against a sheriff's sale of real property under execution, while a serious question is pending and undetermined as to whether the land is really subject to sale in satisfaction of the judgment, a motion to dissolve will not be granted, but the injunction will be continued to the hearing.<sup>1</sup>

§ 1544. To authorize a dissolution of an injunction against a judgment for unpaid purchase money of real estate, granted on the ground of defective title, defendants in the injunction suit will be required to exhibit a good title, and complainant, having covenants of warranty from defendants, will not be compelled to accept a conveyance from a third party.<sup>2</sup> And where the defendant seeks a dissolution of such an injunction on the ground that the title is sufficient, he may be required to produce his title to the court, in order that it may be satisfied as to its sufficiency.<sup>3</sup> While the purchaser of land may properly enjoin its sale under a deed of trust securing the unpaid purchase money, where the title proves defective, yet when the defect is cured by a conveyance of the outstanding title the injunction will be dissolved, although there are general allegations in the bill of other outstanding title which are not supported by proof.<sup>4</sup> But until an actual tender of a good and sufficient conveyance, the injunction should not be dissolved, and if dissolved before vendor has given such conveyance, it may be reinstated.<sup>5</sup>

§ 1545. While the authorities are conflicting as to the right of a purchaser of real estate, with covenants of general

<sup>1</sup> Van Mater v. Holmes, 2 Halst. Ch., 575.

<sup>2</sup> Moore v. Cooke's Adm'rs, 4 Hayw. (Tenn.), 84.

<sup>3</sup> Moredock v. Williams, 1 Overt., 325.

<sup>4</sup> Lovell v. Chilton, 2 West Va., 410.

<sup>5</sup> Grantland v. Wight, 2 Munf., 179.

warranty, to enjoin a judgment for unpaid purchase money on account of defective title,<sup>1</sup> it would seem that if an injunction may be allowed under such circumstances the judgment will not be perpetually enjoined, but only until the purchaser can prosecute his legal remedy on the covenants of warranty, and if he fails to do this within a reasonable period, the injunction will be dissolved.<sup>2</sup>

§ 1546. An injunction granted against a railway company, to restrain it from taking possession of private property without first making payment or tender of damages for the occupancy, will not usually be dissolved on motion, but will be retained until a hearing upon the merits.<sup>3</sup> And where the bill on which an injunction is granted against the prosecution of an action of ejectment charges that the conveyances on which defendant's title rests are fraudulent, the injunction will not necessarily be dissolved on the coming in of the answer, unless it fully and satisfactorily negatives the fraud, and a mere general denial is not sufficient for this purpose.<sup>4</sup>

<sup>1</sup> See § 382, *ante*, *et seq.*

<sup>2</sup> *Swain v. Burnley*, 1 Mo. (2nd edition), 286.

<sup>3</sup> *Ross v. Elizabeth R. Co.*, 1 Green Ch., 422.

<sup>4</sup> *Roberts v. Anderson*, 2 Johns. Ch., 202.

## CHAPTER XXX.

### OF THE PARTIES TO THE ACTION.

- § 1547. General rule as to joinder of parties.
- 1548. Parties not before court.
- 1549. Illustrations.
- 1550. Injunctions against proceedings at law.
- 1551. Officers of court, when necessary parties.
- 1552. Injunctions against judgments at law.
- 1553. Test in cases of public easements.
- 1554. Cases affecting the public.
- 1555. Public nuisances.
- 1556. General test; railway-aid tax; resolution by common council.
- 1557. Injunction against tax.
- 1558. Religious bodies.
- 1559. Principal and agent.
- 1560. Tax payers as plaintiffs.
- 1561. Owner of state bond.
- 1562. Agent of foreign government.
- 1563. Improper joinder of plaintiffs.
- 1564. Omission of necessary defendant; non-resident defendant.

§ 1547. The general principles deducible from the authorities as to the joinder of parties complainant and defendant, in proceedings in courts of equity, apply to the case of an injunction bill, and by these principles the court is guided in determining whether proper parties have been brought before it, for or against whom relief by injunction is asked. It may be premised, generally, that the jurisdiction will be exercised only in behalf of parties interested in the transaction or subject-matter of the proceedings which it is sought to enjoin, and that one who has no personal interest in the matter is not entitled to the relief, even though he may have been a party to the proceedings at law which he seeks to restrain.<sup>1</sup> Nor will equity interpose by injunc-

<sup>1</sup> *Wynne v. Newborough*, 1 Ves. Jr., 164; *Hunter v. Nockolds*, 15 L. J. Ch., 320.

tion for the protection of one who seeks relief indirectly through the equities of other parties, on which they themselves do not insist.<sup>1</sup>

§ 1548. As a general rule, an injunction will not be allowed against a party not a defendant to the bill, or not properly brought before the court.<sup>2</sup> If, however, the court is in full possession of a cause, it may, simply upon motion in the action, restrain parties from proceeding at law with respect to the same matter.<sup>3</sup> And a purchaser under a decree in equity may be enjoined from acting contrary to the decree, although not a party to the proceedings.<sup>4</sup>

§ 1549. Where the effect of an injunction would be to cause material injury to the rights of persons not before the court, the relief will rarely be granted unless in cases of very great necessity.<sup>5</sup> But upon an application for an injunction the court may proceed against such defendants as have been served with process, although others are not yet served.<sup>6</sup> And if the act complained of affects a common right of several persons whose interests are, in a legal point of view, substantially the same, proceedings for an injunction may be instituted by one or more of them in behalf of the others.<sup>7</sup> But the action will not lie against different persons for separate infringements or violations of one and the same right.<sup>8</sup>

§ 1550. It may be laid down as a general proposition, that a court of equity will not enjoin proceedings in an action at law in behalf of one not a party to the suit which it is sought to enjoin.<sup>9</sup> The converse of this proposition

<sup>1</sup> *Roberts v. Bozon*, 3 L. J. Ch., 113.

<sup>2</sup> *Fellows v. Fellows*, 4 Johns. Ch., 25; *Schalk v. Schmidt*, 1 McCart., 268; *Iveson v. Harris*, 7 Ves., 256; *State of Kansas v. Anderson*, 5 Kan., 90.

<sup>3</sup> *Harrison v. Gurney*, 2 Jac. & W., 563; *Wedderburn v. Wedderburn*, 2 Beav., 208.

<sup>4</sup> *Casamajor v. Strode*, 1 Sim. & St., 381.

<sup>5</sup> *Hartlepool Company v. West Hartlepool Company*, 12 L. T. N. S., 366.

<sup>6</sup> *Brown v. Pacific Company*, 5 Blatch., 525.

<sup>7</sup> *Mozley v. Alston*, 1 Ph., 790.

<sup>8</sup> *Dilly v. Doig*, 2 Ves. Jr., 486; *Pollock v. Lester*, 11 Hare, 274.

<sup>9</sup> *New York v. Connecticut*, 4 Dall., 1.



holds equally true, and an injunction will not be granted in aid of a suit at law against one who is not a party to the action in the legal forum.<sup>1</sup> Nor will equity grant relief against an action at law where it satisfactorily appears that the proceedings were undertaken merely at the instigation of another person.<sup>2</sup>

§ 1551. Where proceedings under a judgment are enjoined, or an injunction is allowed against a sale of lands under judicial process, it is not proper to join as defendants in the bill merely ministerial officers of the court, such as the clerk who issues process, or the sheriff who serves it, they having no interest in the subject-matter in controversy. The injunction operating directly upon the parties to the judgment or proceeding enjoined, is regarded as being operative through them upon all officers of the law acting in consequence of the judgment.<sup>3</sup> An exception is, however, allowed to the rule in cases of fraud, and where there is a fraudulent combination between the officer having the execution in his possession and the judgment creditor, or where the officer is charged with being an active agent in the commission of the fraud, on account of which the judgment is impeached, such officer should be joined as a proper party to the action.<sup>4</sup>

§ 1552. Where an injunction is asked against a judgment at law, all the plaintiffs who have obtained the judgment must be made defendants in the injunction suit.<sup>5</sup> But while it is generally the case that judgments may be enjoined only on the application of those who were parties to the proceedings at law, there may be circumstances which require a departure from the rule. Thus, where a judgment has been fraudulently recovered against an agent, and his

<sup>1</sup> Chamblin v. Slichter, 12 Minn., 276. But see, *contra*, Burpee v. Smith, Walk. (Mich.), 327.

<sup>2</sup> Pentney v. Lynn Paving Commissioners, 13 W. R., 983.

<sup>3</sup> Edney v. King, 4 Ired. Eq., 465; Lackay v. Curtis, 6 Ired. Eq., 199; Olin v. Hungerford, 10 Ohio, 268.

<sup>4</sup> Olin v. Hungerford, 10 Ohio, 268; Allen v. Medill, 14 Ohio, 445.

<sup>5</sup> Berry v. Berry's Heirs, 3 Monr., 263.

principals, though not parties to the proceedings, are bound to reimburse him on account thereof, they are proper parties to ask relief in equity against the judgment.<sup>1</sup> But where an injunction is sought restraining a judgment at law in a United States court which had jurisdiction over all the parties to the action at law, the introduction of new parties in the injunction bill, over whom the court has no jurisdiction, will prevent it from granting the relief prayed. If, however, there be sufficient equity in the case, a stay of proceedings may be granted until relief can be had in the state courts.<sup>2</sup>

§ 1553. Questions of great nicety have sometimes arisen in determining who are proper parties to seek relief by injunction against the violation of rights or easements of a public nature. The true test to be applied in all such cases is to determine whether the persons asking the relief are merely volunteers, or whether they are injured in their individual rights. And while in the latter case the relief will generally be granted, in the former it will be withheld.<sup>3</sup> Thus, the owner of adjacent lots may enjoin the appropriation to private purposes or the sale of a square dedicated to the use of the public. The complainant in such a case, being one of the inhabitants of the town, and owning property contiguous to the square, is not a mere volunteer, assuming to protect the rights of others, but is entitled to the aid of equity for the protection of his own interests.<sup>4</sup> But, on the other hand, the owners of lots around a square which has been conveyed to a county for the use of public buildings have not such an individual interest in the ground as will authorize a court of equity in enjoining, on their application, county commissioners from leasing portions of

<sup>1</sup> *Webster v. Skipwith*, 26 Miss., 341. principle, see *Putnam v. Valentine*, 5 Ohio, 187.

<sup>2</sup> *Dunn v. Clarke*, 8 Pet., 1.

<sup>4</sup> *Brown v. Manning*, 6 Ohio, 298;

<sup>3</sup> *Smith v. Heuston*, 6 Ohio, 101; *Cummings v. City of St. Louis*, 90 Mo., 259.

In illustration of the same general

the ground to private persons, reserving the rent to the county. Such complainants are to be considered in the light of mere volunteers, who sustain no injury to their individual rights, and are not entitled to protection in equity.<sup>1</sup>

§ 1554. When the right involved is purely of a public nature and the grievance which it is sought to enjoin is one which affects the public at large, the proceeding is usually instituted both in England and in this country by the attorney-general in behalf of the people, sometimes proceeding in his own name or that of the people absolutely, and sometimes upon the relation of a citizen.<sup>2</sup> And in actions to enjoin the erection or continuance of public nuisances this course is generally pursued.<sup>3</sup> It is held, however, that the attorney-general can not maintain an action in the name of the people to enjoin the officers of a municipal corporation from issuing its bonds in aid of a subscription to a railway, the state as such having no interest in such litigation and no right to interfere therein.<sup>4</sup>

§ 1555. The corporate authorities of a town are proper parties to enjoin a public nuisance. Thus, the erection of buildings upon a public square which has been dedicated as such to the use of the inhabitants of a town constitutes a public nuisance, which may be enjoined by the corporate authorities.<sup>5</sup> And private persons, specially injured by a nuisance of such a nature, may join with the corporate authorities in filing the bill.<sup>6</sup> So the liability of a town to damages which may result from the obstruction of a public highway renders the town a proper plaintiff in an action

<sup>1</sup> *Smith v. Heuston*, 6 Ohio, 101.

<sup>2</sup> *Attorney-General v. Compton*, 1 Y. & C. C. C., 417; *Attorney-General v. Lea's Heirs*, 3 Ired. Eq., 302; *Same v. Perkins*, 2 Dev. Eq., 38. And see Chapter XIII, Subdivision II, of Public Nuisances.

<sup>3</sup> *People v. Vanderbilt*, 28 N. Y., 396; *Same v. Same*, 38 Barb., 282; *Attorney-General v. Richards*, 2

*Anst.*, 602; *State v. Dayton & S. E. R. Co.*, 36 Ohio St., 434.

<sup>4</sup> *People v. Miner*, 2 Lans., 396. And see this case for a learned and exhaustive review of the authorities upon the right of the attorney-general to interfere by injunction against corporations.

<sup>5</sup> *Trustees v. Cowen*, 4 Paige, 510. And see *Mayor v. Bolt*, 5 Ves., 129.

<sup>6</sup> *Trustees v. Cowen*, 4 Paige, 510.

to enjoin the obstruction.<sup>1</sup> Where, however, the bill is filed in behalf of private citizens to restrain a public nuisance, they must show some special and peculiar injury sustained by themselves, independent of and distinct from the common and general injury shared by the public alike, in default of which equity will not interfere.<sup>2</sup>

§ 1556. The simplest and most generally accepted test in determining whether one is a proper party plaintiff to a bill for an injunction is whether he possesses a legal or equitable interest in the subject-matter of the controversy. Applying this test, it has been held that a state was not a proper party to a bill to restrain a county court from issuing bonds and collecting a tax in aid of a railway, the state having no interest, either legal or equitable, in the subject in dispute.<sup>3</sup> And where an action is brought by the attorney-general, in the name of the people, to restrain the execution of a resolution of the common council of a municipal corporation, giving a contract for certain labor to persons who were not the lowest bidders, as required by law, neither the contractors nor the bidders need be made parties.<sup>4</sup>

§ 1557. Tax payers and residents of a school district are proper parties to institute proceedings for an injunction against the collection of a tax for the payment of judgments obtained through fraud and collusion against the school district.<sup>5</sup> It is to be observed, however, the tax

<sup>1</sup> *Town of Burlington v. Schwarzman*, 52 Conn., 181.

<sup>2</sup> *Bigelow v. Hartford Bridge Co.*, 14 Conn., 565; *O'Brien v. Norwich & W. R. Co.*, 17 Conn., 372; *Frink v. Lawrence*, 20 Conn., 117; *Corn-ing v. Lowerre*, 6 Johns. Ch., 439; *Doolittle v. Supervisors*, 18 N. Y., 160; *Allen v. Board*, 1 Beas., 68; *Hinchman v. Paterson H. R. Co.*, 2 C. E. Green, 75; *Mechling v. Kit-tanning Bridge Co.*, 1 Grant's Cases, 416; *Beveridge v. Lacey*, 3 Rand., 63; *Walker v. Shepardson*, 2 Wis.,

384; *Barnes v. Racine*, 4 Wis., 454; *Williams v. Smith*, 22 Wis., 594.

<sup>3</sup> *State v. Parkville & G. R. Co.*, 32 Mo., 496. As to the necessity of a railway company being made a party to an action to enjoin the issuing of municipal bonds in aid of such company, see *Township of Dixon v. Board of Commissioners*, 25 Kan., 519.

<sup>4</sup> *People v. Mayor*, 32 Barb., 35.

<sup>5</sup> *Newcomb v. Horton*, 18 Wis., 566. And see *Williams v. Peinny*, 25 Iowa, 436.

being upon the individual property of each tax payer, that the injury, if any, is to his individual rights, and does not affect any common interest; it is therefore requisite that each property holder desiring relief against the tax shall bring his separate action, and no one of the number can bring the action in behalf of all.<sup>1</sup> Nor can different owners of real estate in severalty unite in an action to enjoin an assessment upon their property, the cause of action in such case being several and not joint.<sup>2</sup>

§ 1558. Where relief by injunction is sought for the protection of the rights of churches and religious bodies, the action is usually brought in the name of the trustees.<sup>3</sup> Thus, the trustees of a church are proper parties complainant to a bill for an injunction against pretended trustees, to restrain them from meddling with the affairs of the church, and the action need not be brought in the name of the state.<sup>4</sup> So the trustees of a voluntary religious association may, in behalf of their church, enjoin the violation of a burial ground dedicated to the use of the church by the owner of the soil.<sup>5</sup> And under such circumstances a court of equity will grant relief even against the holder of the legal title.<sup>6</sup>

§ 1559. As between principal and agent, relief by injunction is sometimes necessary to prevent the agent from a wrongful conversion or misappropriation of his principal's property. Thus, where certain specific chattels have been delivered to a person to be held by him as agent, and in violation of his duty to his principal he contracts for the sale of the articles to a third person, the principal is entitled to the aid of equity to prevent the agent from parting with or disposing of the goods.<sup>7</sup> So an injunction has been allowed to restrain the transfer of stock in an incorporated

<sup>1</sup> *Newcomb v. Horton*, 18 Wis., 566.

<sup>2</sup> *Jones v. Cardwell*, 98 Ind., 331.

<sup>3</sup> *Trustees v. Hoessli*, 13 Wis., 348; *Beatty v. Kurtz*, 2 Pet., 566.

<sup>4</sup> *Trustees v. Hoessli*, 13 Wis., 348.

<sup>5</sup> *Beatty v. Kurtz*, 2 Pet., 566.

<sup>6</sup> *Id.*

<sup>7</sup> *Wood v. Rowcliffe*, 3 Hare, 304.

company standing in the name of a steward, upon a strong showing that it was purchased from proceeds of his master's or principal's property.<sup>1</sup>

§ 1560. A tax payer may maintain an action in his own name to prevent the commission of an unlawful act by the authorities of a county, the effect of which would be to increase his burden of taxation. And such a case is properly distinguished from that of a public nuisance, where a private citizen must show some special injury peculiar to himself to entitle him to maintain an action.<sup>2</sup> Where, however, tax payers of a county seek to enjoin the county authorities from subscribing to the capital stock of a railway company, and from delivering bonds of the county to the company, and from levying any tax in payment of such bonds, the action should be brought in behalf of themselves and all others similarly situated, and it may be dismissed if brought by plaintiffs alone, they having no other interest in the question to be determined than that common to all tax payers. But in such case the dismissal should be without prejudice, leaving the parties to adjust their rights in another action.<sup>3</sup>

§ 1561. The owner of a state bond, the value of which is being depreciated and its security diminished by the improper diversion of the public funds by a state treasurer, may maintain an action to enjoin such treasurer; since he has a direct and peculiar interest in the preservation and lawful administration of the funds of the state, aside from his general interest as a citizen.<sup>4</sup>

§ 1562. An injunction will not be granted against an agent of a foreign government attached to the embassy of that government and acting under the direction of its foreign ambassador. And in such case, sufficient ground for

<sup>1</sup> *Chedworth v. Edwards*, 8 Ves., 46. But the relief was refused as to money deposited in bank to the account of the steward.

<sup>2</sup> *Commissioners of Clay Co. v. Markle*, 46 Ind., 96.

<sup>3</sup> *Packard v. Board of County Commissioners*, 2 Col., 338.

<sup>4</sup> *Graham v. Horton*, 6 Kan., 343.

refusing the relief is found in the fact that the court would be powerless to enforce its injunction against the representative of a foreign government, either by arrest of the person or by seizure of property.<sup>1</sup>

§ 1563. As regards the effect of an improper joinder of parties plaintiff in a suit for an injunction, it is held that when the bill is multifarious because of joining plaintiffs whose title and right to relief are wholly distinct and disconnected, the injunction may be properly refused upon that ground alone.<sup>2</sup>

§ 1564. But the fact that a necessary party defendant has been omitted from a bill for an injunction will not of itself justify the court in granting a dissolution, when sufficient ground for the injunction is shown, the party omitted being a corporation all of whose members are joined as parties, and when it would be a matter of course to amend by joining the party omitted.<sup>3</sup> And on a bill to enjoin the diversion of water by tort feasers, it is no objection to granting the relief that one of the defendants resides beyond the jurisdiction of the court and has not been served with process; and the suit may be dismissed as to such defendant and proceed as to the others.<sup>4</sup>

<sup>1</sup> *Service v. Castaneda*, 2 Coll., 56.

<sup>4</sup> *Cole Co. v. Virginia Co.*, 1 Sawy.,

<sup>2</sup> *Moore v. Hill*, 59 Ga., 760.

470.

<sup>3</sup> *Morgan v. Rose*, 7 C. E. Green,

583.

## CHAPTER XXXI.

### OF PRACTICE.

I.	PRACTICE IN GRANTING INJUNCTIONS . . . . .	§ 1565
II.	AMENDMENTS . . . . .	1592
III.	PRACTICE IN DISSOLVING INJUNCTIONS . . . . .	1599

#### I. PRACTICE IN GRANTING INJUNCTIONS.

- § 1565. Practice largely regulated by statute.
- 1566. Injunctions granted on bill, or on motion.
- 1567. Verification of bill.
- 1568. Verification of bill by corporation.
- 1569. Requisites of verification.
- 1570. Information by attorney-general.
- 1571. When granted on information and belief.
- 1572. When verification unnecessary.
- 1573. Prayer for injunction.
- 1574. When granted.
- 1575. Failure to present all facts.
- 1576. Admission of affidavits in support of motion.
- 1577. Admission of affidavits in opposition.
- 1578. Notice; federal practice.
- 1579. Notice further considered.
- 1580. The same.
- 1581. Positive allegations of fact necessary; irreparable injury.
- 1582. Form and contents of writ.
- 1583. Failure to file original or amended bill.
- 1584. English and American practice as to time of granting.
- 1585. Supplemental bill.
- 1586. Subsequent application.
- 1587. Waiver of answer under oath.
- 1588. Scandal in bill.
- 1589. Irregularity in service of process; defective allegations.
- 1590. Retaining injunction to the hearing.
- 1591. Practice in awarding perpetual injunction.

§ 1565. Questions of practice connected with the granting and dissolving of injunctions are so largely regulated



by statute and local usage in the different states, that but few rules of general application can be deduced from the decided cases. The most that can be attempted in this direction is to present such leading principles as are believed to be generally recognized by courts of equity in administering relief by injunction, leaving the practitioner to be guided by local rules as to the details of practice.

§ 1566. Interlocutory injunctions are generally granted upon the filing of a bill, properly verified, in which complainant sets forth the equities on which he bases his right to relief, the bill concluding with a prayer for an injunction. Where, however, a court of equity is already in possession of a cause, having jurisdiction both of the subject-matter in controversy and of the parties, it may enforce obedience to its mandates by an injunction issued merely upon a petition in the cause, and without the filing of a bill.<sup>1</sup> Indeed, a court of equity will not ordinarily entertain a new and independent action for an injunction in a matter already pending before the court, and in which plaintiff might obtain full relief by motion.<sup>2</sup> And an injunction may be granted on motion, and without a new action, to restrain a tenant under a receiver of the court from removing articles from the demised premises; in such case, the court proceeds upon the ground that the tenant having entered into a contract with the court itself, through its receiver, a new action is unnecessary.<sup>3</sup>

§ 1567. The proper verification of the bill is a matter of importance, since an injunction is seldom allowed upon other than a sworn bill. Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant upon information and

<sup>1</sup>In the matter of *Hemiup*, 2 the Irish Court of Chancery, the Paige, 316. court may, in a matter of lunacy,

<sup>2</sup>*Faison v. McIlwaine*, 72 N. C., 312. enjoin the commission of waste merely upon motion and with no

<sup>3</sup>*Walton v. Johnson*, 15 Sim., 352. And under the practice of 6 Ir. Eq., 469. cause pending. *In re Chinnerys*,

belief, but they should be positively sworn to.<sup>1</sup> So when an injunction is sought upon the ground of fraud it is not sufficient that the allegations of fraud should be upon information and belief, but they should be positive and founded upon plaintiff's own knowledge, or that of some person conversant with the facts.<sup>2</sup> And where, upon an *ex parte* application for an interlocutory injunction, complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the person of whom his knowledge is obtained and who can swear positively to the facts.<sup>3</sup> An exception, however, is recognized in the case of an injunction in aid of a creditor's bill against the judgment debtor alone, no third parties being joined as defendants, and in such case it is sufficient if complainant swears upon information and belief as to the recovery of the judgment and return of execution *nulla bona*.<sup>4</sup> The exception rests upon the fact that the judgment and execution are matters of record, to which defendants are parties, and complainant is not required to swear positively as to the existence of the records.<sup>5</sup> So, too, the verification of an injunction bill in aid of a creditor's suit may be made by the attorney who has conducted the proceedings at law.<sup>6</sup> And an injunction bill may be verified by an agent, if he is conversant with the facts.<sup>7</sup> But where the bill is by a married woman and the facts relied upon are such as would ordinarily rest only in her own knowledge, a verification by her next friend is insufficient.<sup>8</sup>

<sup>1</sup> *Campbell v. Morrison*, 7 Paige, 157; *Crocker v. Baker*, 3 Ab. Pr., 182; *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44; *Shonk v. Knight*, 12 West Va., 667; *Gaertner v. City of Fond du Lac*, 34 Wis., 497.

<sup>2</sup> *Brooks v. O'Hara*, 8 Fed. Rep., 529.

<sup>3</sup> *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9

Paige, 305; *Youngblood v. Schamp*, 2 McCart., 42.

<sup>4</sup> *Hamersley v. Wyckoff*, 8 Paige, 72; *Sizer v. Miller*, 9 Paige, 605.

<sup>5</sup> *Id.*

<sup>6</sup> *Sizer v. Miller*, 9 Paige, 605.

<sup>7</sup> *Mayor v. Finney*, 54 Ga., 317; *Long v. Kasebeer*, 28 Kan., 226.

<sup>8</sup> *Smith v. Republic Life Insurance Co.*, 2 Tenn. Ch., 631. See also *Ballard v. Eckman*, 20 Fla., 661.

§ 1568. Where an injunction is sought in behalf of a corporation, the bill is usually verified by some officer of the corporation conversant with the facts. It may, however, be verified by an attorney or other agent, without the oath of any of the regular officers of the corporation, when such officers are less acquainted with the facts constituting the foundation for the injunction than the agent or attorney.<sup>1</sup> But an injunction will not be granted upon a bill verified by an attorney of the plaintiff, who swears to no personal knowledge of the facts, no reason being given why the verification is not made by some one personally conversant with the facts.<sup>2</sup>

§ 1569. As to the nature and requisites of the verification itself, it is held that the affidavit should be such as to submit the party to the penalties of perjury if its allegations prove untrue. Nor will it suffice that the affidavit alleges that the material allegations of the bill are true on knowledge and belief,<sup>3</sup> or that the party verifying swears positively to the truth of the material averments, since it is still left uncertain what are the material facts.<sup>4</sup> Neither is it sufficient that the affiant swears that the allegations of the bill are true which render an injunction necessary, or which form the basis of the injunction, since such verification is open to the same objection of uncertainty.<sup>5</sup> And a verification by plaintiff's attorney, which fails to show that he knows any of the facts alleged of his own knowledge, will not suffice.<sup>6</sup> So when the bill is verified by plaintiff's attorney, who only avers that the facts are true so far as the same have come directly to his knowledge, and all else he believes to be true, without averring what facts are di-

<sup>1</sup> *Bank of Orleans v. Skinner*, 9 Paige, 305.

<sup>2</sup> *Manistique L. Co. v. Lovejoy*, 55 Mich., 189.

<sup>3</sup> *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44.

<sup>4</sup> *Sauvinet v. Poupono*, 14 La., 87.

<sup>5</sup> *Hebert v. Joly*, 5 La., 50; *Ric-*

*ard's Heirs v. Hiriart*, Ib., 244; *Elder v. City of New Orleans*, 31 La. An., 500.

<sup>6</sup> *Hone v. Moody*, 59 Ga., 731; *Landes v. Globe P. M. Co.*, 73 Ga., 176; *Manistique L. Co. v. Lovejoy*, 55 Mich., 189.

rectly within his knowledge, it is insufficient.<sup>1</sup> And while it is no objection to the verification that it is made by an attorney or other person in behalf of plaintiff, yet if the affidavit states that the facts alleged in the bill are true so far as known to affiant or stated upon his own knowledge, and that so far as stated upon information he believes them to be true, without stating or designating any facts known to affiant, the verification will be held insufficient.<sup>2</sup> But when the affidavit verifying the bill states that its facts and allegations are true, without averring explicitly that they are all true, it will be held sufficient.<sup>3</sup> And while a bill seeking an interlocutory injunction should be verified by affidavit, if the relief sought is only a final injunction and no temporary injunction is sought, the bill need not be under oath.<sup>4</sup>

§ 1570. The jurisdiction of equity by injunction is sometimes invoked upon an information filed by the attorney-general of the state. In such cases the information of the attorney-general, acting *ex officio* and under the sanction of his oath of office, is equivalent to a bill in chancery verified upon information and belief. Like such a bill, it may in proper cases call for an answer under oath; but, as in such a bill, an injunction will not ordinarily be granted unless the information is supported by positive affidavit, until defendant has had an opportunity to contradict it under oath and has failed so to do.<sup>5</sup>

§ 1571. The fact that many of the material allegations upon which an injunction is sought are stated upon information and belief will not prevent the granting of the relief

<sup>1</sup> Bowes v. Hoeg, 15 Fla., 403.

<sup>2</sup> Pullen v. Baker, 41 Tex., 419; Chesapeake & O. R. Co. v. Huse, 5 West Va., 579. And see the latter case as to the requisites of verification under the code of West Virginia.

<sup>3</sup> Lewis v. Winston, 26 La. An., 707.

<sup>4</sup> Sand Creek Turnpike Co. v. Robbins, 41 Ind., 79; Rich v. Dessar, 50 Ind., 309. See also Commissioners of Clay Co. v. Markle, 46 Ind., 96.

<sup>5</sup> Attorney-General v. Rail Road Companies, 35 Wis., 593. See Attorney-General v. City of Eau Claire, 37 Wis., 400.

when defendant, by demurring to the bill, admits the truth of its allegations, and when the injunction is issued after notice and with no denial upon the part of defendant of the truth of the bill.<sup>1</sup>

§ 1572. While the usual course is to grant an injunction only upon a bill duly verified, it would seem that the oath of complainant or of any other person conversant with the facts may be dispensed with if the confidence of the court can be otherwise obtained. Thus, documentary evidence establishing complainant's equities and his right to relief will suffice to warrant the court in granting an injunction, and such evidence may be presented by properly verified copies of private instruments, or of records, when such is the appropriate mode of proof.<sup>2</sup> And where the right, for the protection of which an injunction is sought, rests upon written instruments, such as promissory notes, none of which are exhibited and no reason or excuse is offered for the failure to present them, the relief will be withheld, although the bill is verified under oath.<sup>3</sup> And it has been held that a bill for an injunction against a judgment at law should make a transcript of the judgment an exhibit in the cause.<sup>4</sup>

§ 1573. The bill should contain a specific prayer for an injunction, since the writ will not be granted under the general prayer for relief. And the injunction must be asked both in the prayer for relief and that for process; otherwise the bill is demurrable.<sup>5</sup> And although the omission of a specific prayer for the injunction is regarded as a defect in form, yet it is held error to grant the relief upon

<sup>1</sup> *Gibson v. Gibson*, 46 Wis., 462.

<sup>2</sup> *Negro Charles v. Sheriff*, 12 Md., 274; *Youngblood v. Schamp*, 2 McCart., 42.

<sup>3</sup> *Nusbaum v. Stein*, 12 Md., 315.

<sup>4</sup> *Parsons v. Wilkerson*, 10 Mo., 713.

<sup>5</sup> *Lewiston F. M. Co. v. Franklin Co.*, 54 Maine, 402; *Willet v.*

*Woodhams*, 1 Bradwell, 411; *African M. E. Church v. Conover*, 12 C. E. Green, 157; *Union Bank v. Kerr*, 2 Md. Ch., 460; *Wood v. Beadell*, 3 Sim., 273. See also *Savory v. Dyer*, Amb., 70; *Thompson v. Maxwell*, 16 Fla., 773. But see, *contra*, *Webb v. Ridgely*, 38 Md., 364.

a bill thus defective.<sup>1</sup> But the defect may be cured by obtaining leave of court to amend the bill by adding the necessary prayer.<sup>2</sup> And it has been held that an injunction may be allowed upon the hearing, although not specifically prayed for in the bill.<sup>3</sup> Or the court may at the hearing, if the proof shall warrant it, permit an amendment to the bill by adding a prayer for a perpetual injunction, and may then grant such relief.<sup>4</sup> And upon a bill praying an injunction *pendente lite*, or until the further order of the court, upon which an interlocutory injunction is granted, it is not error to render a final decree for a perpetual injunction, although not prayed in the bill.<sup>5</sup>

§ 1574. Interlocutory injunctions are usually granted on the bill alone, before issuing process to the defendant, the allegations of the bill being properly verified and the court being satisfied of their truth.<sup>6</sup> A motion for an injunction may, however, be made at any time before final decree, and for the purposes of such motion the answer of the defendant is regarded merely as an affidavit.<sup>7</sup> And upon the filing of an injunction bill, the defendant may, at his option, immediately put in his answer to prevent the issuing of the writ, and the court is bound to consider such answer and give it due weight, if filed before the application for the injunction is disposed of.<sup>8</sup> And when the motion for a preliminary injunction is heard upon bill and answer, or upon bill, answer and affidavits, and the equities of the bill are fully met and negatived, the injunction will not be granted.<sup>9</sup>

<sup>1</sup> *Primmer v. Patten*, 32 Ill., 528; *College C. & R. G. R. Co. v. Moss*, 77 Ind., 139. See also *Jefferson v. Hamilton*, 69 Ga., 401.

<sup>2</sup> *Jacob v. Hall*, 12 Ves., 458; *Wood v. Beadell*, 3 Sim., 273.

<sup>3</sup> *Reynell v. Sprye*, 1 DeGex, M. & G., 660.

<sup>4</sup> *African M. E. Church v. Conover*, 12 C. E. Green, 157.

<sup>5</sup> *Wilmington S. M. Co. v. Allen*, 95 Ill., 288.

<sup>6</sup> *Jones v. Magill*, 1 Bland, 177.

<sup>7</sup> *Warren R. Co. v. Clarion Co.*, 54 Pa. St., 28.

<sup>8</sup> *Hall v. McPherson*, 3 Bland, 529; *Krone v. Krone*, 27 Md., 77.

<sup>9</sup> *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. (2 Stew.), 299; *New Jersey Z. Co. v.*

§ 1575. Where a special injunction is sought *ex parte*, complainant should state in his bill all the material facts bearing upon the subject-matter in controversy, and should set out all documents having a material bearing upon the case, so far as they touch the right to the relief sought. If he fails or neglects to bring such facts or documents to the attention of the court upon the application for the injunction, the court may, on being apprised of such omission, immediately discharge the order for the writ and direct that matters be returned to their former condition, so far as may be done.<sup>1</sup>

§ 1576. The question of the admissibility of affidavits in support of the allegations of the bill, upon a motion for an injunction, has been much controverted, but the doctrine may now be regarded as well established that complainant is entitled to read affidavits in support of his case,<sup>2</sup> although they will not be permitted to enlarge the scope of the bill, since the application must be determined upon the case as presented by the bill.<sup>3</sup> The rule, however, has been limited to affidavits upon questions of fact in distinction from those upon questions of title, since the latter are held not admissible to contradict the answer.<sup>4</sup> And it has been held that affidavits which are not offered until after the filing of the bill or the coming in of the answer are not admissible upon a motion for an injunction.<sup>5</sup> So upon the hearing of a mo-

Franklin I. Co., *Ib.*, 422; *Wellman v. Harker*, 3 Oregon, 253; *Atchison & N. R. Co. v. City of Troy*, 10 Kan., 513.

<sup>1</sup> *Harbottle v. Pooley*, 20 L. T. N. S., 436.

<sup>2</sup> *United States v. Parrott, McAll.*, 271; *Tatem v. Gilpin*, 1 Del. Ch., 13.

<sup>3</sup> *Leo v. Union Pacific R. Co.*, 17 Fed. Rep., 273.

<sup>4</sup> *United States v. Parrott, McAll.*, 271; *Morphett v. Jones*, 19 Ves., 850. See also *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Legal News, 1.

<sup>5</sup> *Brundred v. Paterson Machine Co.*, 3 Green Ch., 294; *Lessig v. Langton, Brightly*, 191. But see *Poor v. Carleton*, 3 Sumner, 83; *Hummert v. Schwab*, 54 Ill., 142. As to the practice of the English Chancery on admitting affidavits against defendant's answer upon a motion for an injunction after answer filed, see *Isaac v. Humpage*, 3 Bro. C. C., 463. The question of the admissibility of affidavits upon motions for injunctions is largely governed by the local practice or by statute in the various states,

tion for a preliminary injunction it is proper to admit affidavits which are manifestly prepared and intended to be used upon such application, although they are not properly entitled in the cause, the modern practice in this regard being more liberal than the former practice.<sup>1</sup> But it is error for a judge at chambers, in opposition to the exceptions of one of the parties to the cause, to hear and determine the issues in an injunction suit upon affidavits only, and to grant a perpetual injunction thereon.<sup>2</sup>

§ 1577. Upon a motion for a preliminary injunction, a defendant who is notified of the application, or required to show cause why the injunction should not issue, may introduce affidavits in opposition to the motion, and this regardless of whether a temporary injunction has or has not been allowed in the meantime.<sup>3</sup> Upon such motion the answer of one of several defendants may be received and read as an affidavit to contradict the allegations of the bill.<sup>4</sup> And a defendant may, if he prefer, oppose the motion merely upon his affidavit and without answer.<sup>5</sup> Nor is the defendant limited, upon the hearing of such application, to evidence tending to disprove the allegations of the bill, but he may introduce any legal evidence tending to show that the injunction should not be granted.<sup>6</sup>

and it is impossible to state any rule of general application.

<sup>1</sup> *Shook v. Rankin*, 6 Biss., 477.

<sup>2</sup> *Hornesby v. Burdell*, 9 S. C., 303.

<sup>3</sup> *Seneca Falls v. Matthews*, 9 Paige, 504; *Kean v. Colt*, 1 Halst. Ch., 365.

<sup>4</sup> *Shreve v. Black*, 3 Green Ch., 177.

<sup>5</sup> *Baker v. Taylor*, 2 Blatch. C. C., 82.

<sup>6</sup> *Stoddart v. Vanlaningham*, 14 Kan., 18. The English chancery practice does not appear to have been uniform with reference to the admissibility of affidavits contra-

dictory to the answer, upon the hearing of a motion for an injunction. See as to this subject and as to the cases where such affidavits have been admitted or excluded, *Rock v. Mathews*, 2 De G. & Sm., 227, and note and chronological table of English cases, page 234. In Louisiana it is held that the only object of a rule *nisi*, to show cause why an injunction should not be granted, is to enable defendant to show, if possible, upon the face of the papers that the relief should not be allowed; and it is held to be improper to admit affidavits pro and con as to the merits, upon the



§ 1578. The question of notice to defendant of an application for a preliminary injunction is largely regulated by legislation, which varies greatly in the different states. In the courts of the United States injunctions were formerly granted only upon notice, such notice being affirmatively required by the judiciary act of 1793.<sup>1</sup> By the Revised Statutes of the United States of June 22, 1874, the provision of the judiciary act of 1793 requiring notice to be given of all applications for injunctions has been repealed, and the courts of the United States, under section 718 of the Revised Statutes,<sup>2</sup> may grant an immediate restraining order, without notice, to be in force until the decision of the court upon the motion for an injunction; and it is held that the courts possess the same power in patent causes under section 4921 of the Revised Statutes.<sup>3</sup> When, under the federal practice, notice is given of an application for an injunction, it is held not to be competent for plaintiff to fix the time of hearing so far ahead as to embarrass defendant, and that it is the right of the latter to come in and have the matter disposed of within a reasonable time.<sup>4</sup>

§ 1579. It may be said generally upon the question of notice, that, in the absence of pressing necessity, it is regarded as improper to grant an interlocutory injunction without notice.<sup>5</sup> And while emergencies may arise which

hearing of the rule *nisi*. Heyniger v. Hoffnung, 29 La. An., 57.

<sup>1</sup> U. S. Statutes at Large, Ch. 22, § 5; Mowrey v. Indianapolis & C. R. Co., 4 Biss., 78.

<sup>2</sup> Section 718 of the Revised Statutes of the United States of 1874 enacts as follows: "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until

the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

<sup>3</sup> Yuengling v. Johnson, 1 Hughes, 607.

<sup>4</sup> Walworth v. Board of Supervisors, 5 Biss., 133.

<sup>5</sup> Androette v. Bowne, 4 Ab. Pr., 440; S. C., 15 How. Pr., 75. See as to the necessity of notice before granting an interlocutory injunction affecting large interests, Atchison, T. & S. F. R. Co. v. Fletcher, 35 Kan., 236.

will warrant the granting of an injunction without notice to the defendant who is sought to be enjoined, yet when a period of six weeks is permitted to elapse after the filing of the bill before the application for an injunction is made, the emergency will not be regarded as so pressing as to warrant the relief without an attempt to notify the defendants.<sup>1</sup> So if defendant has been notified of the motion which he is ready and willing to meet, an injunction should not afterward be allowed against him *ex parte* because, owing to the pressure of business, the motion could not be heard at the time fixed.<sup>2</sup> Nor should an injunction be allowed on an *ex parte* application upon a supplemental bill, affecting the rights of a party who has appeared in the cause, but due notice of the application should be given. And if in such case a temporary injunction is necessary to prevent irreparable injury before regular notice of the application can be given, a rule to show cause should be granted at the same time with the granting of the temporary injunction, which falls if the rule be not made absolute.<sup>3</sup>

§ 1580. Where a rule of court requires notice of the application for an injunction after answer filed, such notice may be waived in the exercise of a sound judicial discretion, and the omission of the notice constitutes no ground for a dissolution.<sup>4</sup> And when, upon the final hearing of a cause, the evidence warrants a perpetual injunction, which is granted accordingly, it affords no ground for reversing such decree that a preliminary injunction was granted in

<sup>1</sup> Swepson v. Call, 13 Fla., 337.

<sup>2</sup> Graham v. Campbell, 7 Ch. D., 490.

<sup>3</sup> Bloomfield v. Snowden, 2 Paige, 355. But in Buckley v. Corse, Saxt., 504, it was held that when an injunction was applied for after the filing of the bill and after appearance by defendant, the latter need not be notified of the applica-

tion merely because he had entered an appearance in the cause.

<sup>4</sup> Buckley v. Corse, Saxt., 504.

But it has been held in Florida, under a statute prohibiting an injunction against proceedings at law without notice, to be no abuse of judicial discretion to grant the relief without notice, when defendant can not be found and

the cause without notice to defendant.<sup>1</sup> It is, however, sufficient ground for reversing a decree awarding a final injunction that it was granted without notice to him, or a hearing in his behalf.<sup>2</sup> But where a bill seeking an injunction is manifestly without equity, it is proper for the court to refuse the relief upon a mere inspection of the bill, and without granting a rule *nisi* upon defendant to show cause against the motion for an injunction.<sup>3</sup>

§ 1581. An interlocutory injunction, being a harsh remedy, is only allowed upon such positive averments of complainant's equities as establish a clear *prima facie* case. And while the party seeking the injunction is not required to establish his right to relief with the same precision and certainty that are required upon a final hearing, he must in all cases allege positively the facts on which he relies.<sup>4</sup> Mere argumentative allegations, or inferences from facts stated, will not entitle him to relief.<sup>5</sup> Nor will general allegations of irreparable injury suffice, when he does not state the facts upon which the allegations are based.<sup>6</sup> And plaintiff must show how and why the damages sustained will prove irreparable, since the question of irreparable damage or injury is a question to be decided by the court from the facts stated.<sup>7</sup>

§ 1582. The form of the writ must of course vary with

when there is danger that the injury feared will be committed before notice can be served. *Lewton v. Hower*, 18 Fla., 872.

<sup>1</sup> *Brown v. Luehrs*, 79 Ill., 575.

<sup>2</sup> *State v. Jacksonville, P. & M. R. Co.*, 15 Fla., 201.

<sup>3</sup> *Remshart v. The Savannah & Charleston R. Co.*, 54 Ga., 579; *Brown v. Wilson*, 56 Ga., 534.

<sup>4</sup> *Perkins v. Collins*, 2 Green Ch., 482; *Holdrege v. Gwynne*, 3 C. E. Green, 26; *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305; *Bogert v.*

*Haight*, Ib., 297; *Jones v. Macon & B. R. Co.*, 39 Ga., 138; *Warsop v. City of Hastings*, 22 Minn., 437.

<sup>5</sup> *Battle v. Stephens*, 32 Ga., 25. And see *Warsop v. City of Hastings*, 22 Minn., 437.

<sup>6</sup> *Branch Turnpike Co. v. Supervisors*, 13 Cal., 190; *Bailey v. Simpson*, 57 Ga., 523; *Crescent City S. H. Co. v. Police Jury*, 32 La. An., 1192; *Crescent City S. H. Co. v. Butchers U. S. Co.*, 33 La. An., 930.

<sup>7</sup> *McKinzie v. Mathews*, 59 Mo., 99.

the particular circumstances of each case, the subject-matter of the injunction, and the parties enjoined. It should contain a description of the particular acts or things concerning which defendant is enjoined, and should be an authentic notification of the mandate of the court.<sup>1</sup> The injunction as granted must be such as is prayed for by the bill, and it is not competent for a court of equity to grant an injunction in terms other than those contained in the prayer of the bill.<sup>2</sup> And the fact that the injunction as granted is broader in terms than the prayer of the bill may afford ground for setting aside the order.<sup>5</sup>

§ 1583. The fact that the bill was not filed until after the injunction was ordered is not sufficient ground for a reversal of the order, such omission being at the most but a mere irregularity which does not affect the merits of the cause.<sup>4</sup> If, however, the court has sustained a demurrer to the bill and no amended bill has yet been filed, although leave to amend was given, it is improper to continue the original injunction, there being nothing on which to base it except the original summons and affidavits in support of the bill, the bill having been held not to state a cause of action.<sup>5</sup>

§ 1584. Under the former English practice, although the Court of Chancery was not limited to terms as were the courts of common law, yet a motion for an injunction could only be made in term or "during the seal;" but under the later practice a common injunction for want of appearance

<sup>1</sup> *Whipple v. Hutchinson*, 4 Blatch., 190; *Summers v. Farish*, 10 Cal., 347.

<sup>2</sup> *Burdett v. Hay*, 33 L. J. Ch., 41.

<sup>3</sup> *Leitham v. Cusick*, 1 Utah, 242.

<sup>4</sup> *Davis v. Reed*, 14 Md., 152. And in a case of great urgency an injunction was granted by one of the English Vice-Chancellors before the filing of the bill, upon plaintiff's undertaking to file the

bill and affidavits in its support during the day. *Thornloe v. Skoines*, L. R. 16 Eq., 126. See also *Carr v. Morice*, L. R. 16 Eq., 125, where an injunction was allowed before bill filed, the bill not being filed because of the day being a public holiday and the court and all the offices being closed.

<sup>5</sup> *Vliet v. Sherwood*, 37 Wis., 165.

might be obtained on any day on which the court sat.<sup>1</sup> Under the earlier English practice, also, if a plea were interposed to the bill the court would not entertain a motion for an injunction before disposing of the plea.<sup>2</sup> Nor would an injunction be granted pending a demurrer to the bill.<sup>3</sup> And where an injunction was sought, the effect of which would be to restrain defendant from pursuing his trade, the court refused to interfere before answer.<sup>4</sup> In this country the courts are frequently empowered to grant injunctions during vacation, but questions concerning such power are so purely statutory as to admit of no general governing principle outside of the letter of the statute conferring such jurisdiction; but it is believed that in most of the states interlocutory injunctions may be granted upon the filing of the bill and before answer. And a court of equity, independent of statute, has power to issue a preliminary injunction upon Sunday, in a case where immediate relief is necessary for the prevention of irreparable injury.<sup>5</sup>

§ 1585. When events have occurred since the institution of the original suit for an injunction which would warrant the relief, it is proper to allow such matters to be presented by a supplemental bill.<sup>6</sup> But when a supplemental bill is allowed after the filing of the original bill, it should be put in under oath.<sup>7</sup>

§ 1586. The refusal to grant an injunction upon an interlocutory application constitutes no bar to a subsequent renewal of the application, which can only be barred by a decree upon a full and final hearing.<sup>8</sup> There is, therefore, no impropriety in making a second application for an in-

<sup>1</sup> *Chesterfield v. Bond*, 2 Beav., 263.

<sup>2</sup> *Humphreys v. Humphreys*, 3 P. Wms., 395.

<sup>3</sup> *Cousins v. Smith*, 13 Ves., 164.

<sup>4</sup> *Jackson v. Barnard*, Ca. temp. H., 259.

<sup>5</sup> *Langabier v. Fairbury, P. & N. R. Co.*, 64 Ill., 243.

<sup>6</sup> *Howard v. Simmons*, 25 La. An., 668.

<sup>7</sup> *Richardson v. Dinkgrave*, 26 La. An., 651.

<sup>8</sup> *Glass v. Clark*, 41 Ga., 544; *Halcombe v. Commissioners*, 89 N. C., 346.

junction which has once been refused, when new and additional matter is presented which has been discovered since the former hearing.<sup>1</sup> But a judgment between the same parties dissolving an injunction upon final hearing operates as a bar to the granting of a subsequent injunction upon the same grounds, or upon grounds existing prior to the suit in which the judgment of dissolution was rendered, and of which plaintiff in that suit might have availed himself in the first instance.<sup>2</sup>

§ 1587. Upon the question of the effect of a waiver of defendant's answer under oath it is held that when plaintiff waives a discovery under oath, he is not thereby absolved from the burden of making out his case for an injunction upon the interlocutory as well as upon the final hearing.<sup>3</sup> And although plaintiff by his bill waives the answer of defendant under oath, if defendant puts in his answer under oath it may be used as an affidavit in support of a motion to dissolve.<sup>4</sup>

§ 1588. When a bill for an injunction is referred to a master because of scandal, and the master reports that it is scandalous, and an order is entered expunging the scandalous matter, the court will not entertain a motion for an injunction until the scandal is expunged, since until then it can not be determined what the bill really is.<sup>5</sup>

§ 1589. A mere irregularity in the service of process in the cause affords no ground for withholding an injunction against a defendant who has notice of the motion and appears in opposition.<sup>6</sup> But a bill for an injunction which

<sup>1</sup> *Blizzard v. Nosworthy*, 50 Ga., 514; *Halcombe v. Commissioners*, 89 N. C., 346. But in *France v. France*, 4 Halst. Ch., 619, it was held that after an injunction had been regularly dissolved on the coming in of the answer, a motion for a renewal would not be entertained upon testimony subsequently taken.

<sup>2</sup> *Porter v. Morere*, 30 La. An., 230.

<sup>3</sup> *Mathews v. Cody*, 60 Ga., 355.

<sup>4</sup> *Andrews v. Knox Co.*, 70 Ill., 65.

<sup>5</sup> *Davenport v. Davenport*, 6 Madd. (1st American Edition), 157.

<sup>6</sup> *Thayer v. Wales*, 9 Blatch., 170; S. C., 5 Fish., 130.

does not allege that defendant is doing or threatening the acts which are sought to be enjoined is bad on demurrer, even though it be alleged that the act in question will result in great and irreparable injury to plaintiffs.<sup>1</sup>

§ 1590. Where upon motion to continue an injunction until the hearing it is apparent to the court that there is a serious question for the hearing, which if determined in plaintiff's favor will entitle him to the relief sought, the injunction will be retained until the hearing.<sup>2</sup> And where upon the filing of the bill an injunction is granted in part to the extent prayed, upon the argument of a rule to show cause why the injunction should not issue as prayed by the bill the existing injunction will not be removed or dissolved, a notice and motion being requisite for such purpose.<sup>3</sup>

§ 1591. The practice of allowing a perpetual injunction upon motion founded upon affidavits is without precedent and will not be entertained.<sup>4</sup> Nor will a final injunction be granted by a mere order when no action is pending between the parties, actions embracing the controversy between them having already proceeded to final judgment without the granting of an injunction.<sup>5</sup> But where, under the practice of a state, the right to a perpetual injunction is submitted to a jury, who find a special verdict, the facts of which warrant such an injunction, it is proper for the court to award it, although the jury have not in express terms found that defendant should be perpetually enjoined.<sup>6</sup>

<sup>1</sup> *Ploughe v. Boyer*, 38 Ind., 113.

<sup>4</sup> *Whitehurst v. Green*, 69 N. C.,

<sup>2</sup> *Donnell v. Church*, 4 Ir. Eq., 131.

630.

<sup>5</sup> *Jackson v. Bunnell*, 113 N. Y.,

<sup>3</sup> *Manhattan M. & F. Co. v. Van* 216.

*Keuren*, 8 C. E. Green, 251.

<sup>6</sup> *McManus v. Cook*, 59 Ga., 485.

## II. AMENDMENTS.

- § 1592. The general doctrine.  
 1593. Amendment after dissolution.  
 1594. Amendment without prejudice; manner of amending.  
 1595. Dissolution notwithstanding amendment; supplemental bill.  
 1596. When defendant entitled to notice.  
 1597. The Irish practice.  
 1598. Omitting non-resident defendant.

§ 1592. While the propriety of allowing amendments to injunction bills has been said to be exceedingly questionable,<sup>1</sup> it may be regarded as an established rule that the bill may be amended, even after motion to dissolve the injunction, and if when so amended it shows sufficient cause for continuing the injunction, which is not overborne by defendant, it will be continued.<sup>2</sup> And it is not error to overrule a motion for a dissolution on the ground of defects in the bill, when an amended bill has been filed curing those defects and taking the place of the original without changing the cause of action.<sup>3</sup> The right to amend should be guarded with the utmost caution by the court, and amendments should be allowed only when the circumstances of the case indicate that the promotion of justice requires this course.<sup>4</sup> And in all cases the truth of the new allegations, as well as the causes requiring the amendment, should be duly verified by affidavit.<sup>5</sup> And amendments should never be allowed when they are obviously intended for purposes of delay.<sup>6</sup> Nor is the practice to be approved of permitting

<sup>1</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227.

<sup>2</sup> *Crawford v. Paine*, 19 Iowa, 172. And see *Sweatt v. Faville*, 23 Iowa, 321; *Edwards v. Jenkins*, 3 Bro. C. C., 426. But see *Rhodes v. Union Bank*, 7 Rob. (La.), 63, where it is held that after the filing of a motion to dissolve, complainant will not be allowed to support his original proceedings and give effect to

an injunction originally illegal, by new allegations. It is to be observed, however, that in this case the new allegations were not sworn to.

<sup>3</sup> *Sweatt v. Faville*, 23 Iowa, 321.

<sup>4</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227. See also *Sharp v. Ashton*, 3 Ves. & B., 144.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



plaintiff, after obtaining a full answer from defendant, to amend by introducing new matter.<sup>1</sup> And an amendment to an injunction bill after answer, without prejudice to an injunction already granted, should be allowed with great caution and only upon special grounds being shown by affidavit.<sup>2</sup>

§ 1593. After an injunction has been actually dissolved upon the merits, complainant may still amend his bill and obtain a new injunction upon the bill thus amended.<sup>3</sup> It is to be observed, however, that after a dissolution has been allowed for want of equity in the bill, the court will not entertain an application, *ex parte*, for another injunction upon an amended bill, or upon a new one supplying the equity wanting in the first, but will require notice to the defendant; since, if complainant is willing to swear to a bill fitting the opinion of the court, defendant's rights should not be interfered with without allowing him to be first heard.<sup>4</sup>

§ 1594. An injunction bill may be amended without prejudice to the existing injunction, by obtaining leave of court for that purpose, the amendments relating to matters existing prior to the filing of the bill.<sup>5</sup> And the prevailing doctrine now is that whenever, pending an injunction, an amendment is allowed to the bill, it is without prejudice to the injunction, which still stands, although the order granting leave to amend is silent as to its effect upon the injunction.<sup>6</sup> So plaintiff may amend even after demurrer filed,

<sup>1</sup> See opinion of Lord Eldon in *Powell v. Lassalette*, Jac., 549.

<sup>2</sup> *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.*, 3 Del. Ch., 512.

<sup>3</sup> *Buckley v. Corse*, Saxt., 504.

<sup>4</sup> *Hornor v. Leeds*, 2 Stockt., 86.

<sup>5</sup> *Walker v. Walker*, 3 Ga., 302; *Mair v. Thellusson*, 3 Ves. & B., 145, note.

<sup>6</sup> *Selden v. Vermilya*, 4 Sandf. Ch., 573; *Harvey v. Hall*, L. R. 11

Eq., 31; *Warburton v. London & B. R. Co.*, 2 Beav., 253. And the fact that plaintiff had amended his bill, while it might afford ground for dissolving the common injunction under the English practice, upon an application for that purpose, did not operate *ipso facto* as a dissolution. *Brooks v. Purton*, 1 Y. & C. C. C., 271. See also opinion of Lord Cottenham in *Ferrand v. Hamer*, 4 Myl. & Cr., 143.

and the amendment will not prejudice the injunction.<sup>1</sup> But a sworn bill can not be amended by striking out material allegations, and the amendments are to be made by the addition of explanatory and supplemental statements. These should be distinctly presented to the court, properly verified under oath, with a sufficient excuse for their not having been presented in the original bill.<sup>2</sup>

§ 1595. While it is within the province of a court of equity to permit amendments to injunction bills, yet if complainant, instead of amending his original bill so as to sustain an injunction already granted, files what is in fact a new bill, praying for a new injunction, the court may properly dissolve the injunction upon a motion filed before the amended bill, notwithstanding such amendment.<sup>3</sup> And if the original bill shows no sufficient ground for the relief prayed, it can not be aided by a supplemental bill presenting matters which have arisen since the commencement of the suit, when such matters have no connection with the grounds of relief relied upon in the original bill.<sup>4</sup>

§ 1596. When a bill is amended by praying for an injunction against a defendant as to whom no injunction was originally prayed, he is entitled to reasonable notice and an opportunity to show cause why the relief should not be granted. And the omission of such notice, or opportunity to show cause, has been held sufficient ground for reversing the judgment of the court granting the injunction.<sup>5</sup>

§ 1597. Under the Irish chancery practice a motion to amend an injunction bill, after appearance and answer by defendant, is not a motion of course, and where plaintiff does not show that the matter of the proposed amendment has come to his knowledge since answer, and when he has

<sup>1</sup> *Warburton v. London & B. R. Co.*, 2 Beav., 253.

<sup>2</sup> *Carey v. Smith*, 11 Ga., 539.

<sup>3</sup> *Des Moines R. Co. v. Carpenter*, 27 Iowa, 487.

<sup>4</sup> *Fahs v. Roberts*, 54 Ill., 192.

<sup>5</sup> *Kehler v. The Jack Manufacturing Co.*, 55 Ga., 639.

been guilty of considerable laches in asking leave to amend, the motion will be refused.<sup>1</sup>

§ 1598. It is proper, upon the hearing of a motion for an interlocutory injunction, to permit the bill to be amended by striking out the name of a non-resident defendant, who is not served with process, without prejudice to the motion.<sup>2</sup>

<sup>1</sup> *O'Beirne v. O'Beirne*, 1 Ir. Ch.,  
152.

<sup>2</sup> *Cole Co. v. Virginia Co.*, 1 Sawy.,  
470.

## III. PRACTICE IN DISSOLVING INJUNCTIONS.

- § 1599. Motion to dissolve, when entertained.  
 1600. Notice of motion to dissolve.  
 1601. Defendant's answer, when excluded.  
 1602. Objections to answer for insufficiency.  
 1603. Admission of affidavits on motion to dissolve.  
 1604. Affidavits not allowed to take the place of answer.  
 1605. Distinction as to common and special injunctions.  
 1606. Injunctions against the infringement of patents.  
 1607. Introduction of affidavits as to new matter.  
 1608. Objection as to insufficient security.  
 1609. Practice on death of complainant.  
 1610. Practice on death of defendant.  
 1611. Continuance of motion to dissolve.  
 1612. Effect of sworn answer.  
 1613. Multifariousness of bill; improper joinder of parties.  
 1614. Defective verification can not be remedied on motion to dissolve.  
 1615. Filing of answer a waiver of objections to refusal of dissolution.  
 1616. Rule *nisi*, English practice.  
 1617. Rights of stranger to suit.  
 1618. Final hearing.

§ 1599. Motions for the dissolution of interlocutory injunctions are usually made upon the coming in of the answer, which is to be taken as true in so far as it is responsive to the allegations of the bill.<sup>1</sup> If the injunction has been granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity in the bill.<sup>2</sup> And where the writ has been allowed by a judge at chambers, a motion to dissolve may nevertheless be made directly to the court, without applying to the same judge.<sup>3</sup> Nor is it necessary that defendant should have been served with process in the cause, since, if otherwise apprised of the exist-

<sup>1</sup> Harris v. Sangston, 4 Md. Ch., 394; Merwin v. Smith, 1 Green Ch., 182.

<sup>2</sup> Receivers v. Biddle, 3 Green Ch., 222.

<sup>3</sup> Woodruff v. Fisher, 17 Barb., 224.

ence of the injunction, he may voluntarily appear and apply for a dissolution.<sup>1</sup>

§ 1600. A motion for a dissolution will not usually be entertained without notice to the opposite party,<sup>2</sup> and even where the right exists by statute of dissolving or vacating an injunction without notice, this should not be done unless from the urgency of the case such a course is necessary to guard against serious loss.<sup>3</sup> The notice should point out the particular grounds on which a dissolution is sought, and it is not sufficient to state generally that it is for irregularity in the proceedings, but it should appear in what the irregularity complained of consists.<sup>4</sup> And the court itself must be the judge as to what constitutes reasonable notice.<sup>5</sup>

§ 1601. Where notice of the motion for a dissolution is given before answer filed, defendant will not be allowed to read his answer subsequently filed in support of the motion, since complainant, on being notified of the motion, has a right to expect that it will be heard upon the case as it then stands.<sup>6</sup> And upon a motion to dissolve an injunction granted against two defendants, an answer purporting to be that of both defendants, but which is in fact the answer of but one of them, and is only sworn to by one, will not be admitted.<sup>7</sup>

§ 1602. The defendant in an injunction suit, by his motion to dissolve, plants himself upon the answer and its sufficiency, and stands pledged to sustain it, since by it he must stand or fall. And since the motion is founded on the correctness of the answer, objections of every kind may

<sup>1</sup> *Waffle v. Vanderheyden*, 8 Paige, 45.

<sup>2</sup> *Newton Manufacturing Co. v. White*, 47 Ga., 400; *Pike v. Bates*, 34 La. An., 391.

<sup>3</sup> *Peck v. Yorks*, 41 Barb., 547; *O'Conner v. Starke*, 59 Miss., 481.

<sup>4</sup> *Miller v. Traphagen*, 2 Halst. Ch., 200.

<sup>5</sup> *Newton Manufacturing Co. v.*

*White*, 47 Ga., 400. See also *Flurence v. Paschal*, 48 Ala., 458. And see as to sufficiency of notice to solicitor of motion to dissolve, *Hiller v. Cotten*, 54 Miss., 551.

<sup>6</sup> *Cattell v. Nelson*, 3 Halst. Ch., 122.

<sup>7</sup> *Vaughn v. Johnson*, 1 Stockt., 173.

be made to its sufficiency upon the hearing of the motion to dissolve.<sup>1</sup> Hence it follows that exceptions to the answer will not, *per se*, prevent the dissolution of an injunction, but the court will look into the exceptions upon the argument of the motion to dissolve, and will give them the weight to which they are entitled.<sup>2</sup> And since, for the purposes of the motion to dissolve, such allegations of the bill as are not answered are taken as true, the fact that exceptions to the answer for insufficiency have not been disposed of affords no ground of objection to the dissolution.<sup>3</sup> A different rule, however, prevailed under the English practice, and if after filing his answer defendant neglected to avail himself of his privilege of moving to dissolve until exceptions were filed to his answer, he was not allowed to move for a dissolution until his exceptions were disposed of by the court.<sup>4</sup> But the English rule has never been received with favor in this country, and where parts of the answer are responsive to the bill upon matters within defendant's knowledge, and fully deny the equity upon which the injunction rests, it is no reason for retaining the injunction that some of the exceptions to the answer are well taken.<sup>5</sup>

§ 1603. Upon a motion to dissolve, on the coming in of the answer, complainant will not usually be allowed, unless a different practice prevails by statute, to file additional affidavits, either in support of his bill, or for the purpose of contradicting the answer.<sup>6</sup> Some exceptions to the rule

<sup>1</sup> *Gibson v. Tiltou*, 1 Bland, 352.

<sup>2</sup> *Smith v. Thomas*, 2 Dev. & Bat. Eq., 126; *Edney v. Motz*, 5 Ired. Eq., 233; *Wyckoff v. Cochran*, 3 Green Ch., 420; *Jones v. Magill*, 1 Bland, 177; *Salmon v. Clagett*, 3 Bland, 125; *Bradford v. Peckham*, 9 R. I., 250.

<sup>3</sup> *Baltimore & O. R. R. v. Wheeling*, 13 Grat., 40.

<sup>4</sup> *Howes v. Howes*, 1 Beav., 197;

*Williams v. Davis*, 1 Sim. & Stu., 262.

<sup>5</sup> *Mitchell v. Mitchell*, 5 C. E. Green, 234.

<sup>6</sup> *Gentry v. Hamilton*, 3 Ired. Eq., 376; *Howell v. Robb*, 3 Halst. Ch., 17; *Eastburn v. Kirk*, 1 Johns. Ch., 444; *Roberts v. Anderson*, 2 Johns. Ch., 202; *Moredock v. Williams*, 1 Overt., 325. Notwithstanding the decided weight of

are, however, recognized by the authorities, and where the effect of a dissolution would be that the parties would not remain *in statu quo* upon the final hearing, and where, as in cases of waste or nuisance, serious and irreparable mischief would ensue from the delay, the strictness of the rule may be relaxed.<sup>1</sup> But in cases of injunctions relating to partnership matters, as where one member of a firm is restrained from using the co-partnership name, or doing any act relating to the business of the firm, complainant will not be allowed, on a motion to dissolve, to read *ex parte* affidavits to contradict the answer.<sup>2</sup> And upon showing

authority in support of the rule as laid down in the text, it has been strongly contended by Mr. Justice Story that the admission of affidavits upon a motion to dissolve should be left entirely to the discretion of the court. In *Poor v. Carleton*, 3 Sumner, 70, that learned jurist observes as follows: "The admission of the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules, as to the exercise of that discretion. \* \* The truth seems to be, that, in cases of this sort, the practice has been shifting, from time to time, to meet the new exigencies of society and the pressure of peculiar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. The practice in America has, I believe, on this sub-

ject, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that without it irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground that the granting and dissolving injunctions in cases of irreparable mischief rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer."

<sup>1</sup> *Davis's Ex'rs v. Fulton*, 1 Overt., 121; *Moredock v. Williams*, 1 Overt., 325; *Barnard v. Davis*, 54 Ala., 565.

<sup>2</sup> *Eastburn v. Kirk*, 1 Johns. Ch.,

cause against the dissolution it is not competent for plaintiff to introduce affidavits as to matters alleged in his bill of which defendant by his answer avers his ignorance.<sup>1</sup>

444. And see *Roberts v. Anderson*, 2 Johns. Ch., 202. But see, *contra*, *Naylor v. Wellington*, 8 Sim., 396. "The general rule," says Kent, Chancellor, in *Eastburn v. Kirk*, "is against the admission of affidavits in these cases, and the instances in which they have been admitted are special, and exceptions to the general rule. Lord Kenyon, when Master of the Rolls, appears to have doubted the correctness of the practice in any case. They have been admitted in cases of waste, and in cases analogous, resting on the same principle, and where irreparable mischief might ensue; and I am aware that partnership cases have been brought within this rule. In one of the cases cited (2 Bro., 89), the affidavits sought to be read against the answer were the original affidavits on which the injunction to stay waste had been founded, and which the defendant must have had an opportunity to have seen before his answer. In this case, the injunction was granted upon the filing of the bill, and the answer meets the charges; but if these affidavits are to be admitted, the defendant, on whom they must operate as a surprise, can have no opportunity to meet them; for it is well understood, in all the cases, that affidavits can not be admitted in support of the answer in this stage of the cause; and the defendant might be condemned, upon the strength of these affidavits, to a suspension of the ex-

ercise of his rights as a partner, until the hearing, without any opportunity or means of vindicating himself. This case does not strike me as very analogous to the case of waste. The injunction, here, is not to restrain the defendant from committing waste, or doing a positive wrong, but from the exercise of all his rights as partner, from the apprehension that he may abuse them. The allegation of previous abuse is made, on one side, by the bill, and denied on the other, by the answer; and if the answer be full, and a denial of all equity, and of every *gravamen* in the bill, it must, upon the present motion, be taken for true. If the injunction is dissolved, the defendant may, undoubtedly, abuse his rights as a partner to the injury of his co-partners; but the case does not seem to contemplate the occurrence of mischief which the law would deem irreparable, and future abuse may be the ground for further application. In the case from 9 Vesey (*Berkeley v. Brymer*, 9 Ves., 355), the Chancellor refused affidavits to support an injunction to restrain the negotiation of a bill. To admit the affidavits in this case would be to authorize their admission in every other case, and would go to destroy the general rule. The motion for their admission must be denied."

<sup>1</sup> *Castellain v. Blumenthal*, 12 Sim., 47.



So where the answer clearly and explicitly denies plaintiff's title, which is the foundation of the relief prayed, *ex parte* affidavits should not be received to contradict such denials.<sup>1</sup>

§ 1604. The general rule is well established that a motion to dissolve an injunction should be based upon defendant's answer, and that affidavits will not be allowed to take the place of the answer for the purposes of the motion.<sup>2</sup> Nor is it proper to introduce affidavits in support of the answer, on a motion to dissolve, where the same motion has been denied on the answer itself. If the answer in such case be deemed insufficient, the dissolution will be refused and the injunction will stand until the trial.<sup>3</sup> The rule as here laid down, however, is to be understood as excluding only *ex parte* affidavits, and it is held that depositions taken upon due notice, after an injunction has been sustained and the cause continued, may be read on a motion to dissolve made by defendant on an amended answer.<sup>4</sup> And for the purposes of a motion to dissolve, which is based upon the bill, answer and affidavits, the answer may be considered as an affidavit.<sup>5</sup>

§ 1605. A distinction as to the practice upon motions to dissolve has been taken between what are called common or ordinary injunctions, such as those to judgments at law, and special injunctions for the prevention of irreparable mischief, as in cases of waste. The distinction is based upon the fact that, in cases of the latter description, the

<sup>1</sup> *Barnard v. Davis*, 54 Ala., 565. Under the code of procedure in California, if defendant bases his motion to dissolve upon the papers on which the injunction was granted, plaintiff is not allowed to make further showing by affidavits in support of his case. But if defendant makes a counter showing by affidavits, either with or without answer, plaintiff is per-

mitted to introduce affidavits in rebuttal. *Falkinburg v. Lucy*, 35 Cal., 52. See also *Delger v. Johnson*, 44 Cal., 182.

<sup>2</sup> *Sacket v. Hill*, 2 Mich., 182.

<sup>3</sup> *Hoffman v. Livingston*, 1 Johns. Ch., 211.

<sup>4</sup> *Leroy v. Dickerson*, 1 Carolina Law Repository, 110.

<sup>5</sup> *Bradford v. Peckham*, 9 R. I., 250.

injunction is not, as in the former, in aid of or secondary to another equity, but is the very point in the case and the ultimate and only relief sought. It is accordingly held, in cases of special injunctions for the prevention of irreparable injuries, that, on a motion to dissolve, the bill may be read in contradiction to the answer, and if the equity appears in doubt, the motion will be refused and the injunction will be continued to the hearing.<sup>1</sup>

§ 1606. The same distinction has been recognized in the case of an injunction to restrain the infringement of a patent. Such an injunction is regarded as special in its nature, being granted upon notice to the opposite party and affidavits, and differing in this respect from the common injunction, which issues as a matter of course upon cause shown, and is usually dissolved as of course upon the coming in of the answer denying the equity of the bill. In patent cases, therefore, it is held that, on motion to dissolve, the presumptions arising from the answer may be disproved by evidence on the part of complainant, and that counter testimony is then admissible to sustain the answer.<sup>2</sup>

§ 1607. While new matter contained in the answer, which is not responsive to any allegations of the bill, will not, as a rule, be considered upon the hearing of a motion to dissolve,<sup>3</sup> yet, if defendant relies upon such new matter in support of his motion, complainant may be allowed to introduce affidavits for the purpose of contradicting it.<sup>4</sup> So an affidavit showing that the injunction was irregularly issued, and that the officer allowing it was misled or deceived

<sup>1</sup> *Purnell v. Daniel*, 8 Ired. Eq., 9; *Troy v. Norment*, 2 Jones Eq., 318; *Lloyd v. Heath*, Busb. Eq., 89. And it has even been held in cases of special injunctions for the prevention of irreparable injury, that the denial in the answer of complainant's equity will not suffice to warrant a dissolution. *Peterson v. Matthis*, 3 Jones Eq., 81. But the doctrine is hardly sustained by the weight of authority. <sup>2</sup> *Woodworth v. Rogers*, 8 Woodb. & M., 135; *Brooks v. Bicknell*, 3 McLean, 250. <sup>3</sup> *Wooten v. Smith*, 27 Ga., 216. And see *Lawrence v. Philpot*, Ib., 585. <sup>4</sup> *Merwin v. Smith*, 1 Green Ch., 182.

as to the facts in the case, and thereby granted the injunction contrary to law, is admissible on the hearing of a motion to dissolve.<sup>1</sup> And in some states the question of the admissibility of affidavits upon the motion to dissolve depends upon whether they were filed before or after the coming in of the answer. Thus, it has been held that affidavits filed by complainant before answer may be read on the motion, but if filed after answer they can not be read.<sup>2</sup> The practice, however, upon this subject is so dependent upon the rules of practice and the statutes of different states, that no general rule can be devised susceptible of universal application.

§ 1608. The objection that the security in the injunction bond was not approved by the court will not avail upon the final hearing, and can only be urged upon the motion to dissolve, since the only question upon the hearing is whether complainant is entitled to the relief prayed, and the question of whether the temporary injunction was properly or improperly awarded can not then be considered.<sup>3</sup>

§ 1609. Although legal proceedings usually abate by the death of a party to the action, yet an injunction, being in the nature of a judgment of the court, continues in force until dissolved by the court itself. And the proper practice upon the death of a complainant, after obtaining an injunction and before a hearing, is to apply to the court for a rule upon the administrator, or other representative of the deceased, to revive the action, or in default thereof that the injunction will be dissolved.<sup>4</sup> It follows, therefore, that upon the death of complainant before the hearing, defendant is not entitled to an immediate dissolution upon the coming in of his answer, no administration having yet been had upon complainant's estate, and he being unrepresented

<sup>1</sup> *Carroll v. Farmers Bank*, Harrington. (Mich.), 197.

<sup>2</sup> *Kinsler v. Clarke*, 2 Hill Eq., 617.

<sup>3</sup> *Boston v. Nichols*, 47 Ill., 353.

<sup>4</sup> *Hawley v. Bennett*, 4 Paige, 163; *Griffith v. Bronaugh*, 1 Bland, 547; *Walsh v. Smyth*, 3 Bland, 9; *Carter v. Washington*, 1 Hen. & M., 203; *Jackson v. Arnold*, 4 Rand., 195.

in the cause.<sup>1</sup> And in no event does the abatement of an injunction suit by the death of the complainant operate, *per se*, as a dissolution of the injunction, but an order of the court is required for that purpose.<sup>2</sup>

§ 1610. A similar practice prevails in case of the death of a defendant against whom an injunction has been obtained, and the court will grant a rule on complainant that the injunction shall stand dissolved unless renewed against the representatives of the deceased within a given period.<sup>3</sup> The rule, however, does not apply to the case of merely formal or nominal parties to the proceedings, and upon their death the cause may proceed without making their representatives parties to the record. And where defendant's answer is made and properly sworn to by him, but he dies before filing it, the answer may nevertheless be used on the hearing of a motion to dissolve the injunction.<sup>4</sup>

§ 1611. Questions concerning the continuance of motions for dissolution may be regarded as subject to the exercise of a sound legal discretion. But since courts of equity are regarded as being always open for the granting of preliminary injunctions, or to reinstate them after being improperly dissolved, an application to continue a motion for a dissolution will not be received with favor, and the continuance will only be granted upon a showing of the very gravest necessity.<sup>5</sup>

§ 1612. Although complainant may have waived defendant's answer under oath, yet if defendant, notwithstanding such waiver, files a sworn answer denying the equities of the bill, the injunction will be dissolved. And it may be said generally that the answer of defendant is entitled to the same credit as complainant's bill, so that the

<sup>1</sup> Hill v. Jones, 1 Murph., 211.

<sup>4</sup> Dennis v. Green, 8 Ga., 197.

<sup>2</sup> Collier v. Bank of Newbern, 1 Dev. & Bat. Eq., 328.

<sup>5</sup> Radford's Ex'rs v. Innes' Executrix, 1 Hen. & M., 8; Horn v. Perry, 11 West Va., 694; Pithole P. C. Co. v. Rittenhouse, 12 West Va., 313.

<sup>3</sup> White v. Fitzhugh, 1 Hen. & M., 1. And see Hawley v. Bennett; 4 Paige, 163; Cummins v. Cummings, 4 Halst. Ch., 173.

fact of the bill being sworn by several complainants, and the answer by only one of the defendants, constitutes no valid objection to the answer.<sup>1</sup>

§ 1613. An objection to the injunction bill on the ground of multifariousness is held to be premature if taken on the motion to dissolve, and although such objection may be well founded, it is entitled to no weight upon the hearing of the motion.<sup>2</sup> An objection, however, for improper joinder of parties, although properly made in the first stages of the cause by demurrer and before answer, may be received even upon the motion to dissolve, and if the objection is one which the defendant has a right to take, the court is then bound to entertain it, and if it be valid, to dissolve the injunction.<sup>3</sup>

§ 1614. A defect in the verification of the bill can not be supplied upon the hearing of a motion to dissolve the injunction, since the granting of an injunction upon a bill thus defective is not merely an irregularity, but an error to which the doctrine of waiver does not apply.<sup>4</sup> But if an injunction bill has been properly sworn, the fact that the officer administering the oath has neglected to sign the jurat does not constitute sufficient ground for dissolution.<sup>5</sup> And objections to the form and contents of an affidavit used in support of an answer upon motion to dissolve should be made in the court below, and will not be considered upon appeal to an appellate tribunal.<sup>6</sup>

§ 1615. We have already seen that an injunction is to be implicitly obeyed until properly discharged, however irregular or erroneous the proceedings may have been in the first instance, and even though no sufficient ground existed for issuing the writ.<sup>7</sup> A distinction, however, is taken

<sup>1</sup> *Manchester v. Dey*, 6 Paige, 295. See also *Lockhart v. City of Troy*, 48 Ala., 579.

<sup>2</sup> *Shirely v. Long*, 6 Rand., 764.

<sup>3</sup> *Hudson v. Maddison*, 12 Sim., 416. See also *Jones v. Garcia del Rio, Turn. & R.*, 297.

<sup>4</sup> *Perkins v. Collins*, 2 Green Ch., 482.

<sup>5</sup> *Capner v. Flemington Mining Co.*, 2 Green Ch., 467.

<sup>6</sup> *Prout v. Lomer*, 79 Ill., 331.

<sup>7</sup> See § 1416, *ante*.

in the mode of procedure in obtaining the dissolution of injunctions irregularly issued, and those which are properly obtained. And while the usual practice in obtaining the dissolution of injunctions regularly issued is by a motion to dissolve, yet if the order for the injunction is irregular in the first instance, the proper practice is to move for the discharge of the order, and not for the dissolution of the injunction, since a motion to dissolve operates as a waiver of the irregularity.<sup>1</sup> And an order for an injunction irregularly obtained will not be sustained upon the merits of the case as disclosed on an application to discharge for irregularity.<sup>2</sup> But the irregularity in obtaining the injunction may be waived by the subsequent conduct of defendant, if such conduct amounts to a recognition and affirmance of the mandate of the court.<sup>3</sup> Upon the overruling of a motion to dissolve, defendants, having filed their answer to the bill, can not assign the overruling of the motion as error. Such motion is regarded as in the nature of a demurrer to the bill, and the answer being in the nature of a plea, defendants by answering waive the previous demurrer, and can not afterward take advantage thereof.<sup>4</sup>

§ 1616. It was the practice of the English Court of Chancery not to grant a motion to dissolve absolutely in the first instance, but to first grant a rule *nisi*; and when the rule *nisi* had been omitted the court would refuse to grant a motion to dissolve absolutely.<sup>5</sup> If defendant had pleaded to the bill instead of answering, it was regarded as improper to grant an order *nisi* upon the bill for a dissolution.<sup>6</sup> But where plaintiff had obtained an injunction until answer or further order, and defendant had interposed a plea to the entire bill, which plea was allowed on argument, it was held that defendant was entitled to a dissolution.<sup>7</sup>

<sup>1</sup> *Vipan v. Mortlock*, 2 Meriv., 476; *Angier v. May*, 3 W. R., 330.

<sup>2</sup> *Brooks v. Purton*, 4 Beav., 494.

<sup>3</sup> *Vipan v. Mortlock*, 2 Meriv., 476. See *Travers v. Stafford*, 2 Ves. Sen., 20.

<sup>4</sup> *Craig v. The People*, 47 Ill., 487.

<sup>5</sup> *Raincock v. Young*, 16 Sim., 566.

<sup>6</sup> *Wroe v. Clayton*, 10 Sim., 185.

<sup>7</sup> *Philips v. Langhorn*, Dick., 148.

§ 1617. One who is not a party to the suit, but whose rights are affected by the injunction, may come in by petition and have the injunction construed or so modified as to preclude all risk of violating it by pursuing rights acquired previous to its being granted.<sup>1</sup>

§ 1618. It is held that when an injunction cause is submitted for final hearing upon bill, answer and depositions, as well as upon a motion to dissolve the interlocutory injunction, without objection by plaintiff, it is not error to dismiss the bill as well as to dissolve the injunction, if the record warrants such proceedings, even though the cause had not been formally set for hearing.<sup>2</sup>

<sup>1</sup>Speak v. Ransom, 2 Tenn. Ch.,  
210.

<sup>2</sup>Alford v. Moore's Adm'r, 15  
West Va., 597.

## CHAPTER XXXII.

### OF THE BOND AND DAMAGES.

I.	OF THE BOND . . . . .	§ 1619
II.	SURETIES . . . . .	1635
III.	RIGHT OF ACTION . . . . .	1648
IV.	ASSESSMENT OF DAMAGES . . . . .	1657
V.	DAMAGES . . . . .	1663
VI.	COUNSEL FEES . . . . .	1685

### I. OF THE BOND.

- § 1619. Object of the bond.
- 1620. Effect of statute; discretion of court.
- 1621. Order ineffectual till bond given; when bond operative; extends to all defendants.
- 1622. Insufficiency or irregularity of bond.
- 1623. Judgment enjoined; sale of specific article.
- 1624. Consideration for bond; how far merits examined in action on.
- 1625. Second injunction against same judgment.
- 1626. Additional security; new bond.
- 1627. Bond "on the usual terms;" obligors estopped.
- 1628. Statutes construed.
- 1629. Bond given in confederate states during rebellion.
- 1630. Failure to specify particular sum; recovery limited to penalty in bond.
- 1631. Delivery of bond for prosecution.
- 1632. Enforcement of bond in equity.
- 1633. Validity not considered on appeal by principal.
- 1634. Approval; name of surety; trustee as obligor.

§ 1619. The plaintiff in an injunction suit is usually required, as a condition precedent to obtaining an interlocutory injunction, to file a bond, with sufficient sureties, conditioned for the payment to defendant of all costs and damages that may accrue to him in the event of the injunction being improperly issued. These bonds, being generally prescribed and regulated by statute, differ in different



states, their general purpose and object, however, being everywhere the same, viz., to protect defendant from any wrongful interference with his rights, and to reimburse him for all damages and costs incurred by reason of an injunction improperly issued.

§ 1620. Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute; and it is error, in such case, to grant the injunction without the required bond.<sup>1</sup> But the bond must be construed and governed by the statute in force at the time of its execution, and a statute then enacted, but which does not take effect until after such execution, can not have a retroactive operation so as to affect a bond given prior thereto, since the question is one which goes to the contract itself and not merely to the remedy thereon.<sup>2</sup> But in the absence of any statute prescribing the conditions of the bond, it rests in the discretion of the court to fix the terms upon which the relief may be granted, and where plaintiff gives such bond as is required by the court, and fails to prosecute his suit successfully, he is liable for all damages sustained by reason of the injunction.<sup>3</sup> And it has been held that where plaintiff's right is clear and the infraction of that right is satisfactorily established, no security need be required to protect defendant against such damages as may be incurred by reason of the injunction.<sup>4</sup> But the failure of plaintiff to give a bond to obtain a preliminary injunction which the court has awarded him will not prevent him from obtaining a perpetual injunction upon the final hearing of the cause.<sup>5</sup>

<sup>1</sup> *Miller v. Parker*, 73 N. C., 58.

<sup>2</sup> *Mix v. Vail*, 86 Ill., 40.

<sup>3</sup> *Newell v. Partee*, 10 Humph., 325. See as to bond required in Texas upon an injunction restraining the collection of money, *Foste v. Shephard*, 33 Tex., 687.

<sup>4</sup> *Dodd v. Flavell*, 2 C. E. Green, 255.

<sup>5</sup> *Harrison v. Board of Supervisors*, 51 Wis., 645. It is held, under the laws of West Virginia, that an injunction bond can not be required of an executor or administrator seeking to restrain the enforcement of a judgment against him in his representative capacity, and that the bond, if given, will be

§ 1621. An order for an injunction is considered ineffectual until the required bond is executed, and it has even been held that the order need not be regarded until the security is given.<sup>1</sup> But while the injunction is not usually allowed to take effect until the bond is given, yet if by inadvertence it is made to take effect before, it will not be reversed upon that ground.<sup>2</sup> The bond becomes operative and the obligation thereunder attaches from the time of filing it with the proper officer of the court.<sup>3</sup> And the protection afforded by the bond extends to all defendants in the injunction suit, regardless of whether they were served with process, provided they conform to the requirements of the injunction.<sup>4</sup>

§ 1622. Insufficiency of the bond does not of itself constitute ground for a dissolution of the injunction in the first instance, but a reasonable time should be allowed for filing a new bond, the injunction meanwhile continuing in force.<sup>5</sup> Indeed, a motion to dissolve, based upon the inadequacy of the bond, would seem to be not well founded, when there is no suggestion that complainant is insolvent and unable to respond individually in damages, since it is always competent for the court to require additional security.<sup>6</sup> And where the writ is properly granted in other respects, it will not be reversed because the bond is for an insufficient sum, if the defendant is not injured thereby.<sup>7</sup> So when the court believes there is sufficient ground for retaining the injunction, and overrules a motion to dissolve, it is not error to permit additional security to be given.<sup>8</sup> Nor is the bond vitiated by the insertion of conditions which, al-

treated as void, either as a statutory or common law obligation. *State v. Johnson*, 28 West Va., 56.

<sup>1</sup> *Pell v. Lander*, 8 B. Mon., 554.

<sup>2</sup> *Chesapeake & O. R. Co. v. Patton*, 5 West Va., 234.

<sup>3</sup> *Lothrop v. Southworth*, 5 Mich., 436.

<sup>4</sup> *Cumberland Co. v. Hoffman Co.*, 39 Barb., 16.

<sup>5</sup> *Beauchamp v. Supervisors*, 45 Ill., 274; *Gamble v. Campbell*, 6 Fla., 347; *Chesapeake & O. R. Co. v. Patton*, 5 West Va., 234.

<sup>6</sup> *Crawford v. Paine*, 19 Iowa, 172.

<sup>7</sup> *Drake v. Phillips*, 40 Ill., 388.

<sup>8</sup> *Woolfolk v. Woolfolk*, 22 La. An., 206.

though not required by law, are nevertheless not contrary to law, such conditions being regarded merely as surplusage.<sup>1</sup> So although the condition of the bond is less extensive than as required by the statute, yet if it contains a material part of the conditions required it will be held obligatory to the extent of such conditions.<sup>2</sup> But when the condition of the bond is broader than required by law, while the obligation may be held good to the extent that the condition accords with the statute, there can be no recovery beyond what would have been allowed had the condition been in accordance with the statute.<sup>3</sup>

§ 1623. Where the bond is conditioned for the payment of the judgment enjoined, the obligors will be held liable at law for this amount, although complainant may have been so far justified in resorting to equity as to preclude a decree against him for damages upon dissolving the injunction.<sup>4</sup> But where the purpose of the injunction is merely to restrain the sale of a specific article of property under execution, a bond given by one not a party to the judgment is considered in equity only as a security to the obligee for such injury as may actually accrue, and not for the whole amount of the debt, even though it be so conditioned.<sup>5</sup>

§ 1624. The suspension and delay occasioned by an injunction are considered as a sufficient consideration, *prima facie*, for the bond.<sup>6</sup> And in an action upon the bond the court will not examine the grounds on which the injunction was awarded, and will not inquire whether the writ was properly or improperly issued.<sup>7</sup> So in assessing damages upon the dissolution of an injunction restraining legal proceedings for the collection of a demand, where the person

<sup>1</sup> Johnson v. Vaughan, 9 B. Mon., 217; Holliday's Ex'rs v. Myers, 11 West Va., 276.

<sup>5</sup> Hanley v. Wallace, 3 B. Mon., 184.

<sup>2</sup> Holliday's Ex'rs v. Myers, 11 West Va., 276.

<sup>6</sup> Mahan v. Tydings, 10 B. Mon., 351.

<sup>7</sup> Dowling v. Polack, 18 Cal., 625.

<sup>3</sup> Menken v. Frank, 57 Miss., 732. And see Cummings v. Mugge, 94

<sup>4</sup> Hunt v. Scobie, 6 B. Mon., 469. Ill., 186.

injured only seeks to recover his expenses in procuring the dissolution, it is not proper to go into evidence upon the merits of the proceeding which was restrained.<sup>1</sup> But in an action upon an injunction bond the obligors have been allowed to put in evidence the record of the action in which the bond was given, for the purpose of showing that the injunction was not dissolved upon the merits, but because of the pendency of another action in the same court between the same parties concerning the same subject-matter, and because the court was of opinion that the relief should have been sought in the original action, and not in an independent suit.<sup>2</sup>

§ 1625. In an action upon a bond given to enjoin the enforcement of a judgment, the injunction having been dissolved and the bill dismissed, it constitutes no defense to the action that, after the dissolution of the former injunction, the judgment was again enjoined, and that the last action is still pending and undetermined; and a special plea of the pendency of another injunction against the same judgment is, therefore, no defense to the action upon the bond.<sup>3</sup> But in such case it is regarded as inequitable to permit the enforcement of the judgment upon the bond, although there was no legal defense to the action, and the judgment may, therefore, be enjoined.<sup>4</sup>

§ 1626. In continuing an injunction a court of equity may require additional security, or a bond with new and enlarged conditions. And it may order the new bond to be given in place of the old and as a substitute for it, and

<sup>1</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282.

<sup>2</sup> *Stewart v. Miller*, 1 Mont., 301. As to the right of the obligors in an injunction bond to show in a suit upon the bond that the injunction was not in fact obtained, notwithstanding the recital in the bond, see *Adams v. Olive*, 57 Ala., 249. And in *Swan v. Timmons*, 81

Ind., 243, it is held that upon the trial of an action upon the bond, the record of a subsequent suit between the parties, wherein the injunction sought in the first action was obtained, is not admissible, either in bar of the action, or in mitigation of damages.

<sup>3</sup> *Weaver v. Poyer*, 73 Ill., 489.

<sup>4</sup> *Weaver v. Poyer*, 79 Ill., 417.

the old bond may thereby be discharged without the consent of the obligee.<sup>1</sup> But if the order of the court be not substantially complied with, as where by mistake of the clerk the new bond is conditioned merely for the payment of the costs, the former bond is not discharged.<sup>2</sup> And if the bond originally given be insufficient in amount it is proper to permit plaintiff to give a new bond before proceeding with the cause, although it is error to perpetuate the injunction upon condition of plaintiff executing another bond within a specified time.<sup>3</sup>

§ 1627. When an injunction is granted against a judgment at law, the order of court directing that it be allowed "on the usual terms," it is to be regarded as granted upon the terms of giving a bond conditioned as prescribed by law. And the obligors in such bond, in an action brought thereon, are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction.<sup>4</sup>

§ 1628. Under a statute providing that no injunction shall issue to stay "proceedings at law in a personal action after verdict or judgment," it is held that a suit at law instituted in another state, upon a judgment originally obtained in the former state, is not within the prohibition of the statute, and may be enjoined without the statutory bond; but the injunction should not go to the extent of restraining proceedings upon the judgment in the former state without the requisite security.<sup>5</sup> And where a statute provided that no injunction should issue to stay proceedings at law after verdict, unless the person applying therefor should enter into a satisfactory bond to the plaintiff in the action at law, conditioned to pay the debt enjoined, with interest and damages, the statute was held to be limited to cases where defendant in the judgment sought to restrain

<sup>1</sup> *Kent v. Bierce*, 6 Ohio, 336.

<sup>4</sup> *Harman v. Howe*, 27 Grat., 676.

<sup>2</sup> *Kent v. Bierce*, 7 Ohio, 2nd part, 209.

<sup>5</sup> *Cairo & F. R. v. Titus*, 11 C. E. Green, 94.

<sup>3</sup> *Downes v. Monroe*, 42 Tex., 307.

its enforcement; and when, in such case, a third person, not a party to the judgment, but a creditor of the same defendant, sought to enjoin the judgment creditor from obtaining an undue preference by his judgment, he was allowed the relief without bond.<sup>1</sup>

§ 1629. In an action upon an injunction bond given in one of the confederate states during the rebellion, it is no defense to the bond that the chancellor under whose order it was given and the register who approved it and to whom it was payable were not legal officers, being officers of a government in rebellion against the United States, since the acts of such officers are not void.<sup>2</sup>

§ 1630. An injunction bond is not void merely because it fails to specify any particular sum in which the obligors are bound, the undertaking in the bond being to indemnify defendant against all such damages as he may sustain by reason of the injunction.<sup>3</sup> But when an injunction is granted upon condition that a bond shall be filed in a given sum, which is done, and no further order is made as to the damages, defendants are limited in their recovery of damages to the amount of the penalty in the bond.<sup>4</sup>

§ 1631. When the court has ordered that the injunction bond be delivered up to the obligees for prosecution, and they have instituted suit thereon, such order should not be rescinded except for good cause shown.<sup>5</sup>

§ 1632. A court of equity will not ordinarily entertain jurisdiction of an action to recover damages sustained by an injunction, when adequate relief may be had by an action at law.<sup>6</sup> But if the proceedings for the enforcement of the bond are had in equity, in a case in which the court properly has jurisdiction upon grounds of trust and the

<sup>1</sup> *Scarlett v. Hicks*, 13 Fla., 314.

<sup>2</sup> *Estis v. Prince*, 47 Ala., 269.

<sup>3</sup> *North Carolina G. A. Co. v. North Carolina O. D. Co.*, 79 N. C., 48.

<sup>4</sup> *Glover v. McGaffey*, 56 Vt., 294.

<sup>5</sup> *Brown v. Easton*, 3 Stew., 725, reversing *Easton v. New York & L. B. R. Co.*, *Ib.*, 236.

<sup>6</sup> *Ruble v. Coyote G. & S. M. Co.*, 10 Oregon; 39.

prevention of a multiplicity of suits, the court may distribute the proceeds in accordance with the rights and equities of all parties in interest, even though some of them are not named in the bond.<sup>1</sup>

§ 1633. Where damages are assessed upon the dissolution of an injunction, but the sureties in the bond do not appeal therefrom, the appeal being taken by the principal only, the validity of the bond will not be considered in the appellate court.<sup>2</sup>

§ 1634. It is proper, although not absolutely essential, that the approval of the court or judge should be indorsed upon the bond, but it is not material that the name of the surety should appear in the body of the bond. And the fact that an obligor in the bond executes it in the capacity of trustee does not constitute any defense to an action brought thereon, but only affects the form of the judgment against such obligor.<sup>3</sup>

<sup>1</sup>*Oelrichs v. Spain*, 15 Wal., 211.      <sup>3</sup>*Griffin v. Wallace*, 66 Ind.,

<sup>2</sup>*Gibson v. O'Connell*, 30 Tex., 410.

## II. SURETIES.

- § 1635. Liability of sureties strictly construed.  
1636. Illustrations of the doctrine.  
1637. Estoppel against sureties; solvency of principal.  
1638. Parol evidence inadmissible; misrecital.  
1639. Injunction against judgment; sale of personalty.  
1640. General doctrine further illustrated.  
1641. Sureties can not go behind decree; their liability not altered by stipulation of the parties.  
1642. Remedy against surety by suit on bond.  
1643. The Louisiana practice.  
1644. The New York doctrine; sureties concluded by reference.  
1645. Surety concluded by assessment of damages against principal.  
1646. Receiver over personal property.  
1647. Right of sureties to appeal.

§ 1635. The liabilities and obligations of sureties upon injunction bonds are governed by the general law of contracts and are usually akin to those incurred by sureties upon other like obligations. There are, however, some features pertaining to this class of sureties which are deserving of especial notice. And, in the first place, it is to be observed that the undertaking of a surety in an injunction bond is one which is strictly construed, and his liability will not be extended by construction beyond the terms of the instrument.<sup>1</sup> When, therefore, the bond is given to two defendants who are enjoined, and is conditioned to pay them all such costs and damages as shall be awarded if the injunction is dissolved, there can be no recovery against the surety upon a dissolution of the injunction against one of the defendants only, it being still retained as to the other.<sup>2</sup> So the sureties are liable for such damages only as result from the injunction itself, and not for damages caused by the unlawful act of the person obtaining the in-

<sup>1</sup> *Ovington v. Smith*, 78 Ill., 250; *Mon.*, 28; *Tarpey v. Shillenberger*, *Webber v. Wilcox*, 45 Cal., 301; 10 Cal., 390; *Anderson v. Falconer*, *Hall v. Williamson's Adm'r*, 9 34 Miss., 257.

*Ohio St.*, 17; *Ashby v. Tureman*, 3 <sup>2</sup> *Ovington v. Smith*, 78 Ill., 250. *Lit.*, 6; *Ferguson v. Tipton*, 1 B.



junction during its pendency. They can not, therefore, be held liable for the value of the property in controversy which has been wrongfully disposed of by plaintiff in the injunction suit while the injunction was in force.<sup>1</sup>

§ 1636. In conformity with this tendency toward a strict construction of the undertaking of sureties upon this class of obligations, it is held when the bond is conditioned that the sureties shall be liable for such damages as may be sustained by reason of the injunction, if the court shall finally decide that plaintiff is not entitled thereto, that this liability will not be extended beyond a final decree in the lower court perpetuating the injunction, and will not warrant a recovery for costs and attorney fees accruing after that time.<sup>2</sup> So when the injunction is dissolved upon the hearing and judgment is given in favor of defendants, and plaintiff then appeals, the sureties upon the injunction bond are not liable for damages sustained in consequence of such appeal. And this is true even though, after the appeal is prayed, the court below orders the injunction to be continued until the decision of the appellate court, since such order is regarded as a new injunction, and the sureties are not liable for damages thereafter occurring; they can not, therefore, be held liable for counsel fees paid for arguing the case in the appellate tribunal.<sup>3</sup> So in the case of an injunction restraining proceedings under a judgment, although the statute requires a bond conditioned for the payment of the judgment, as well as damages and costs, yet if in fact the bond is taken for damages and costs only,

<sup>1</sup> *Cummings v. Mugge*, 94 Ill., 186.

<sup>2</sup> *Webber v. Wilcox*, 45 Cal., 301.

<sup>3</sup> *Town of Guilford v. Cornell*,<sup>14</sup> Ab. Pr., 220. Although the bond in this case was conditioned to pay such damages as defendants might sustain, "by reason of the said injunction, if this court should finally decide that the said plaintiff

was not entitled thereto," it was held that the words "this court" were to be understood as if the words "the court" were used, and that the sureties were liable for the damages resulting from the injunction, although the final decision that plaintiff was not entitled to the writ was made by the appellate court.

the sureties will not be held beyond that for the amount of the judgment itself.<sup>1</sup>

§ 1637. The sureties in an injunction bond are estopped from denying that the injunction recited in the bond was granted. Nor can they, in an action upon the bond, plead that an execution was sued out on the judgment enjoined, and satisfied by a levy before final decree in the injunction suit. And where the sureties are bound for the performance of such final decree as may be rendered against their principal, on the death of the complainant and the revival of the cause by his administrator they are equally bound for the satisfaction of whatever decree may be rendered against him.<sup>2</sup> Nor does the fact that the principal in the bond is solvent and able to meet his liabilities constitute any defense, in mitigation of damages or otherwise, to an action against the sureties.<sup>3</sup>

§ 1638. The contract of a surety upon an injunction bond is within the statute of frauds and is to be strictly construed; parol evidence is, therefore, not admissible to add to, vary, or contradict it in any of its terms. And while it has been held that a misrecital in the condition of the bond as to the amount of the judgment enjoined may be corrected by the bill, where the bond contains a plain reference to the bill, upon the principle of *id certum est quod certum reddi potest*,<sup>4</sup> yet the better doctrine seems to be that the liability of the surety is strictly limited to his undertaking, and that such misrecital can not be corrected.<sup>5</sup>

§ 1639. If the bond is conditioned that the obligor shall pay all sums of money, damages and costs that may be awarded against him in case the injunction is dissolved, the sureties are not liable for the amount of the judgment enjoined, if that be not adjudged against the obligor upon the

<sup>1</sup> *Ashby v. Tureman*, 3 Lit., 6; <sup>4</sup> *Williamson's Adm'rs v. Hall*, 1 *Ferguson v. Tipton*, 1 B. Mon., 28. Ohio St., 190.

<sup>2</sup> *Fowler v. Scott*, 11 Ark., 675. <sup>5</sup> *Hall v. Williamson's Adm'rs*, 9

<sup>3</sup> *Hunt v. Burton*, 18 Ark., Ohio St., 17.  
188.

dissolution.<sup>1</sup> Nor will a misrecital in the bond as to the terms of the injunction and its extent subject the surety to payment of judgments at law, if from the injunction it appears that the collection of the judgments was not enjoined.<sup>2</sup> And although a statute authorizes damages to be assessed upon the amount of money enjoined, upon the dissolution of an injunction restraining the collection of money, yet upon the dissolution of an injunction against a sale of personal property under execution it is error to render judgment upon motion against plaintiff and his sureties upon the bond for the value of the property and damages thereon, when the sureties have only undertaken to pay such damages as may be sustained by the wrongful issuing of the writ.<sup>3</sup>

§ 1640. The sureties in the bond are entitled to stand upon the precise terms of the contract, and their liability will not be extended beyond its terms. When, therefore, the bond is conditioned for the payment of such damages as shall be awarded against the principal by reason of issuing the injunction, an action can not be maintained against the sureties when it is not averred that any damages were so awarded.<sup>4</sup> So if the bond is conditioned for the payment of such costs and damages as may be recovered against the principal for the wrongful suing out of the injunction, there can be no recovery upon the bond when it is not alleged that there has been a recovery against the principal for wrongfully suing out the injunction.<sup>5</sup>

§ 1641. In an action upon an injunction bond the sureties will not be permitted to go behind the final decree in the injunction suit and to assail the validity of an agreement upon which that decree was founded.<sup>6</sup> Nor, upon the

<sup>1</sup> *Corder v. Martin*, 17 Mo., 41.

<sup>2</sup> *Hord v. Trimble*, 1 Lit., 413.

<sup>3</sup> *Ferguson v. Herring*, 49 Tex., 126.

<sup>4</sup> *Tarpey v. Shillenberger*, 10 Cal., 390; *Anderson v. Falconer*, 34 Miss., 257.

<sup>5</sup> *Dunn v. Davis*, 37 Ala., 95.

<sup>6</sup> *Oelrichs v. Spain*, 15 Wal., 211.

And see as to the effect of the final decree in the injunction suit upon the sureties who have signed the bond in that suit, *Towle v. Towle*, 46 N. H., 431.

other hand, is it competent for the parties to an injunction suit, by a stipulation made between themselves, to alter or vary the liability of the sureties upon the injunction bond.<sup>1</sup>

§ 1642. The appropriate means of enforcing the liability of a surety upon an injunction bond is by an action at law upon the bond, unless otherwise provided by statute. And in the absence of statutory authority a court of equity has no jurisdiction over the sureties upon such bonds, and can not render judgment against them upon dissolving the injunction, even though the court is authorized by statute to render judgment against the principal in the bond upon a dissolution of the injunction.<sup>2</sup>

§ 1643. In Louisiana, however, the surety upon the bond is treated as a party to the suit in which the injunction is granted.<sup>3</sup> And it would seem that, under the practice in that state, it is proper upon dissolving the injunction to give judgment for damages against the plaintiff in the injunction suit and the surety upon his bond in the same proceeding, and without a new action for that purpose.<sup>4</sup> Where, however, damages are awarded upon dissolution against the principal alone and not against the surety, and execution is thereupon issued against the surety, he may enjoin the enforcement of such execution.<sup>5</sup>

§ 1644. Under the New York practice it is held that the sureties in the bond, who have undertaken, if the court shall finally decide that plaintiff is not entitled to the injunction, to pay such damages as shall be ascertained by reference or otherwise as the court may direct, are concluded by a reference made to determine the damages which is duly con-

<sup>1</sup> *Mix v. Vail*, 86 Ill., 40.

<sup>2</sup> *Bailey v. Gibson*, 29 Ark., 472; *Clayton v. Martin*, 31 Ark., 217. And a statute providing that upon the dissolution of an injunction the court should immediately enter up judgment against the sureties as well as principal in the bond has been held unconstitutional and

void. *Hughes v. Hughes' Adm'r*, 4 Monr., 43.

<sup>3</sup> *Green v. Huey*, 23 La. An., 704. See *Verges v. Gonzales*, 33 La. An., 410; *Union Bethel Church v. Civil Sheriff*, 33 La. An., 1461.

<sup>4</sup> *Mora v. Avery*, 22 La. An., 417.

<sup>5</sup> *Frantz v. Waggaman*, 28 La. An., 514.

firmed by the court, even though the sureties were not notified of or heard upon the assessment of damages on such reference. The undertaking of the sureties, in such case, is held to be absolute to pay such damages as may be assessed, and in the absence of collusion they can not, in an action upon the bond, go behind the judgment for damages rendered upon such reference in the original suit.<sup>1</sup> And it is held that a surety desiring to show fraud in the execution of the bond can only do so in an action upon the bond itself, and not upon a motion to open the assessment of damages.<sup>2</sup> But such assessment of damages may be set aside because of fraud in procuring the assessment.<sup>3</sup>

§ 1645. Where the undertaking of the surety is to pay all such costs and damages as shall be awarded against the plaintiff in the event of a dissolution of the injunction, and the injunction is dissolved and damages are assessed in the same action in accordance with the law of the state, such decree is conclusive against the surety as to the amount of damages in an action upon the bond, and that amount may properly be recovered against him in such action.<sup>4</sup>

§ 1646. In an action concerning the title to personal property, when plaintiff obtains an injunction against its sale, and is himself appointed receiver over the property, *pendente lite*, but his bill is afterward dismissed for want of equity, it is error to render a decree against plaintiff and his sureties in the injunction bond for the value of the property; since the receiver and the sureties upon his bond are liable for the value of the property, the principal and sureties upon the injunction bond being only answerable for the damage resulting from the wrongful issuing of the injunction.<sup>5</sup>

<sup>1</sup> *Methodist Churches v. Barker*, 18 N. Y., 463; *Poillon v. Volkenning*, 11 Hun, 385. But while notice to the sureties is not necessary in such cases, it is regarded as the fairer and safer course. *Jordan v. Volkenning*, 72 N. Y., 300.

<sup>2</sup> *Bray v. Poillon*, 4 Thomp. & C., 663.

<sup>3</sup> *Jordan v. Volkenning*, 72 N. Y., 300.

<sup>4</sup> *McAllister v. Clark*, 86 Ill., 236.

<sup>5</sup> *Harvey v. Berry*, 1 Baxt., 252.

§ 1647. The sureties upon the bond who are not parties to the suit in which the injunction is obtained can not appeal from the judgment in that suit, since they are not parties to that judgment; and until proceedings are had against them upon the bond, they have no such interest as to warrant them in carrying on the original suit by appeal.<sup>1</sup> But where under the practice of the state damages are assessed upon dissolving an injunction in the same proceeding, if the sureties upon the bond have been notified of such assessment and have been heard thereon and damages have been awarded against them, they are entitled to an appeal from such order, although they are not strictly parties to the injunction suit. Such assessment being conclusive upon them, unless impeached for fraud, they have sufficient interest to entitle them to an appeal.<sup>2</sup> And when separate appeals are taken by the principal and surety in the bond from a judgment rendered against them upon the dissolution of the injunction, the principal in that bond, if otherwise satisfactory, may properly become the surety in the appeal bond upon the appeal taken by his own surety.<sup>3</sup>

<sup>1</sup> *St. Louis Zinc Co. v. Hessel-meyer*, 50 Mo., 180. But in Louisiana it is held that the surety is a necessary party to an appeal in the injunction suits. *Avegno v. Johnston*, 22 La. An., 400. And when the appeal is taken by plaintiff in the injunction suit it is considered

as embracing his sureties with him, and the appeal will not be dismissed because the sureties have not been formally joined. *Lane v. Roselius*, 23 La. An., 258.

<sup>2</sup> *Hotchkiss v. Platt*, 7 Hun, 56.

<sup>3</sup> *State v. Judge of Seventh District Court*, 22 La. An., 262.

## III. RIGHT OF ACTION.

§ 1648. Common law remedy.

1649. When right of action accrues; statute of limitations; parties.

1649 *a*. Dismissal of action; death of defendant.

1650. Injunction must actually issue; no action when cause for injunction removed.

1651. Injunction against judgment; reinstating injunction.

1652. Merits of injunction suit; want of jurisdiction.

1653. Averment of breach.

1654. Disobedience to writ no defense to action.

1655. Imposition upon the court.

1656. Doctrine of the United States courts.

§ 1648. Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond.<sup>1</sup> The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie.<sup>2</sup> But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause.<sup>3</sup>

§ 1649. The general rule is, that upon the dissolution of an injunction and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues.<sup>4</sup> Nor is it necessary that the obligee should

<sup>1</sup> *Gorton v. Brown*, 27 Ill., 489; *cantile Bank*, 4 Mo. App., 195; *Hayden v. Keith*, 32 Minn., 277. *Iron Mountain Bank v. Mercantile*

<sup>2</sup> *Cox v. Taylor's Adm'r*, 10 B. Bank, 4 Mo. App., 505. And see the case last cited for the distinctions between the common law

*Mon.*, 17; *Mitchell v. Southwestern Railroad*, 75 Ga., 398. action and the action upon the bond.

<sup>3</sup> *Cox v. Taylor's Adm'r*, 10 B. *Mon.*, 17; *Manlove v. Vick*, 55 *Miss.*, 567. See also *Keber v. Mer-*

<sup>4</sup> *Tallahassee R. R. Co. v. Hay-*

first sue out an execution upon the decree dissolving the injunction, before instituting proceedings at law for a recovery upon the bond, but he may proceed immediately upon the dissolution.<sup>1</sup> But if the bond is conditioned for the payment of such damages as may be sustained if the court shall finally decide that plaintiffs were not entitled to the injunction, no right of action accrues until the final determination of the suit, and the statute of limitations does not begin to run upon the bond until that time.<sup>2</sup> The action is properly brought in the name of all the joint obligees, although it be in fact only for an injury or loss occasioned to one of them.<sup>3</sup> It has been held, however, that no action at law can be maintained upon the bond until the final determination of the cause in which the injunction issued,<sup>4</sup> even though it has been dissolved upon appeal and the cause remanded for further proceedings, since complainant is still entitled to proceed with his action, and may on final hearing establish his right to an injunction.<sup>5</sup> And an injunction obtained by the plaintiff in an action at law to preserve property *pendente lite* being dissolved, it is held that no reference should be allowed to ascertain damages sustained by defendant by reason of the injunction until the suit at law is determined, since it can not be known until the action is determined whether the plaintiff may not recover in the action at law.<sup>6</sup> But the condition of the bond may be broken by a dissolution of the injunction in part, as well as by a total dissolution; and a right of action may accrue, although the injunction has not been wholly dissolved, provided the decree for a partial dissolution is a final decree disposing of the cause.<sup>7</sup> And although

ward, 4 Fla., 411; Sizer v. Anthony, 22 Ark., 465.

<sup>1</sup> Sizer v. Anthony, 22 Ark., 465.

<sup>2</sup> Dougherty v. Dore, 63 Cal., 170.

<sup>3</sup> Watts v. Sanders, 10 B. Mon., 372.

<sup>4</sup> Bemis v. Gannett, 8 Neb., 236; Bank of Monroe v. Gifford, 65

Iowa, 648; Brown v. Galena M. & S. Co., 32 Kan., 528.

<sup>5</sup> Gray v. Veirs, 33 Md., 159;

Penny v. Holberg, 53 Miss., 567.

<sup>6</sup> Thompson v. McNair, 64 N. C., 448.

<sup>7</sup> White v. Clay's Ex'rs, 7 Leigh, 68.



the suit has been dismissed in the court below, no action can be maintained upon the bond while an appeal remains pending and undetermined from such decree.<sup>1</sup> So if by the final decree the injunction is continued until the performance of a particular act, no action can be maintained upon the bond until such act has been performed.<sup>2</sup>

§ 1649 *a*. The voluntary dismissal of an injunction suit by the plaintiff, after obtaining an interlocutory injunction and giving a bond, is regarded as such a judicial determination of the controversy and as such a breach of the condition as to warrant a right of action upon the bond.<sup>3</sup> And in such case a recovery may be had for the expenses actually incurred in resisting the motion for the injunction, including counsel fees.<sup>4</sup> So when plaintiff, after service of the writ, himself procures an order vacating and discharging it, and afterward and without defendant's consent procures an order discontinuing his action, defendant is thereupon entitled to an assessment of damages upon the undertaking.<sup>5</sup> And when the bond is conditioned to pay such damages as may be sustained if it is finally decided that the injunction should not have been granted, a right of action accrues upon the dismissal of the suit, that being regarded as a judicial determination that the injunction should not have been granted.<sup>6</sup> So an order dissolving an interlocutory injunction after a hearing upon pleadings and affidavits and the subsequent dismissal of the action for the want of prosecution constitute such a final determination that plaintiff was not entitled to the injunction as to warrant an assessment of the damages sustained by defendants.<sup>7</sup> But when the action abates by the death of the defendant, there never having been a judicial determination that plaintiff

<sup>1</sup> *Cohn v. Lehman*, 93 Mo., 574.

<sup>4</sup> *Swan v. Timmons*, 81 Ind., 243.

<sup>2</sup> *Shackelford v. Smith*, 61 Miss., 5.

<sup>5</sup> *Pacific Mail S. Co. v. Toel*, 85 N. Y., 646.

<sup>3</sup> *Swan v. Timmons*, 81 Ind., 243; *Richardson v. Allen*, 74 Ga., 719; *Mitchell v. Sullivan*, 30 Kan., 231.

<sup>6</sup> *Pugh's Adm'r v. White*, 78 Ky., 210.

<sup>7</sup> *Kane v. Casgrain*, 69 Wis., 430.

iff was not entitled to the injunction, the cause of action not being one which survives, no damages can be assessed as for the dissolution of the injunction.<sup>1</sup>

§ 1650. Until the writ of injunction is issued and the defendant is actually restrained thereby no cause of action can exist on the bond, although it has been duly approved and filed.<sup>2</sup> And where an injunction is ordered, but not yet issued, upon condition of complainant giving bond with sufficient security, with which condition he fails to comply, it is error to decree damages against him as upon a dissolution.<sup>3</sup> Nor can there be any recovery upon a bond conditioned that complainant will prosecute the injunction suit with effect, in a case where, at the time of filing the bill, there was sufficient ground for the injunction, which is afterward removed and the injunction is dissolved, since complainant is regarded in such case as having prosecuted his action with effect.<sup>4</sup> And where an interlocutory injunction is obtained upon giving the statutory bond required, but the action is finally discontinued by agreement of the parties because of a change in affairs resulting from an act of legislature passed during the pendency of the action, it is improper to award an order of reference to assess damages by reason of the injunction, since there has been no judicial determination of the merits, or of plaintiff's right to the injunction when obtained.<sup>5</sup>

§ 1651. When a judgment at law is enjoined upon a bond conditioned for the payment of the judgment, with all costs and damages that may be awarded in the event of a dissolution, the right of action upon the bond becomes complete upon final dissolution of the injunction, since that is the contingency upon which the bond is forfeited. It is not necessary, therefore, in such case that the judgment creditor should first pursue his remedy by enforcing his

<sup>1</sup> *Johnson v. Elwood*, 82 N. Y., 362.

<sup>2</sup> *Eakle v. Smith*, 27 Md., 467.

<sup>3</sup> *McCoun v. Delany*, 2 Bibb, 440.

<sup>4</sup> *Watts v. Sanders*, 10 B. Mon., 372; *Butchers U. & S. H. Co. v. Howell*, 37 La. An., 280.

<sup>5</sup> *Palmer v. Foley*, 71 N. Y., 106.

judgment, before resorting to an action upon the bond.<sup>1</sup> And in an action upon such bond, after final dissolution of the injunction, it affords no defense that the judgment which was enjoined has been subsequently reversed as to one of the judgment debtors, but affirmed as to the other.<sup>2</sup> But where an injunction has been dissolved and afterward reinstated, no action will lie upon the bond as for a breach of its conditions, since the new injunction is regarded as but a continuation of the same cause.<sup>3</sup> And when a bond given in an action to enjoin a judgment at law is conditioned for payment or satisfaction of the amount of the judgment, and upon dissolution of the injunction the judgment creditor takes the body of his debtor in execution, thereby satisfying the judgment, this operates as a bar to any recovery upon the bond.<sup>4</sup>

§ 1652. In an action upon an injunction bond after dissolution matters which go to the merits of the injunction suit are not properly admissible as a defense to the action.<sup>5</sup> So in a suit upon a bond conditioned for payment of the judgment enjoined the obligors will not be allowed to defend upon the ground that there were sufficient equities to warrant the injunction.<sup>6</sup> So want of jurisdiction in the

<sup>1</sup> *Harrison v. Balfour*, 5 Sm. & Mar., 301.

<sup>2</sup> *Somerville v. Mayes*, 54 Miss., 31.

<sup>3</sup> *Bentley v. Joslin*, Hemp., 218.

<sup>4</sup> *Porteous v. Snipes*, 1 Bay, 215.

<sup>5</sup> *Sipe v. Holliday*, 62 Ind., 4.

<sup>6</sup> *Hughes' Adm'r v. Wickliffe*, 11 B. Mon., 202. But under the Code of procedure of North Carolina, which requires a bond conditioned for the payment of such damages to the person enjoined "as he may sustain by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto," it is held that damages can not be assessed upon such bond

after dissolution for losses incurred by defendant, when the action was brought and prosecuted by plaintiff in good faith, and that damages can be allowed only upon showing a want of probable cause for the plaintiff's action. *Burnett v. Nicholson*, 79 N. C., 548. So in New Jersey, under a rule of court requiring a bond conditioned to pay to the person enjoined "such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction," it is held that a bond given under such rule is security for damages only in case

court or officer granting an injunction constitutes no valid defense to an action upon the bond or to an assessment of damages after a dissolution.<sup>1</sup> And an action may be maintained upon the bond although the bill for injunction was dismissed for want of prosecution.<sup>2</sup> And where an injunction has been allowed to restrain proceedings under a judgment, while the want of jurisdiction in the court granting the writ may render the obligation void as a statutory bond, it will still be held good as a common law obligation, the obligor having voluntarily given the undertaking and delayed the enforcement of the judgment.<sup>3</sup>

§ 1653. When the bond is conditioned to pay such damages as are sustained by the injunction, if it shall be finally decided that it ought not to have been granted, an averment in an action upon the bond that it was determined by the court that the bill did not contain a statement of facts sufficient to justify the injunction, and that the same was then and there dissolved, has been held a sufficient averment to maintain the action.<sup>4</sup> Nor is any demand for payment necessary before bringing suit upon the bond.<sup>5</sup>

§ 1654. The obligees in the bond may maintain an action. The complainant shall prove not to have been equitably entitled to the injunction when applied for. That the injunction was dissolved upon answer is not, therefore, evidence that plaintiff was not equitably entitled to it, and does not necessarily entitle defendant to an assessment of damages upon the bond. *Smith v. Kuhl*, 11 C. E. Green, 97. But see *Green v. Philadelphia F. & G. Co.*, 11 C. E. Green, 443. But in *Boden v. Dill*, 58 Ind., 273, it is held that when the bond is conditioned for the payment of all damages and costs sustained by the obligee by reason of the injunction should the same be wrongful, the only condition upon which the bond becomes operative is that the injunction is wrongful; and a dissolution is *prima facie* evidence of this fact, and the undertaking then becomes absolute. And in the same case it is held that the bond inures to the benefit of all the defendants enjoined, although but one of them is named therein.

<sup>1</sup> *Hanna v. McKenzie*, 5 B. Mon., 314; *Stevenson v. Miller*, 2 Lit., 306; *Walton v. Develing*, 61 Ill., 201; *Cumberland Co. v. Hoffman Co.*, 39 Barb., 16.

<sup>2</sup> *Kimm v. Steketee*, 44 Mich., 527.

<sup>3</sup> *Hanna v. McKenzie*, 5 B. Mon., 314.

<sup>4</sup> *Smith v. Gregg*, 9 Neb., 212.

<sup>5</sup> *Rosendorf v. Mandel*, 18 Nev., 129.

tion thereon to recover damages sustained by them by reason of the injunction having been improperly granted, regardless of whether they have yielded obedience to the writ. The question whether they have disobeyed the writ is to be determined by the court which granted the injunction, upon proceedings for contempt, and such disobedience can not defeat the action upon the bond for the recovery of damages. Nor can it be said in such case that if they have disobeyed the injunction they have not performed their contract; since the bond is not a contract of their own making, or one into which they have voluntarily entered, and, therefore, the strict rules applicable to contracts mutually and voluntarily entered into can not be extended to such a case.<sup>1</sup>

§ 1655. An injunction bond has been declared forfeited when it appeared that plaintiff had no equity whatever, and that he had imposed upon the court by invoking its aid, not for himself but for other persons in his name.<sup>2</sup>

§ 1656. The federal courts are not bound by the laws of the particular state in which they are held as to fixing the conditions of an injunction bond, or as regards the rights and obligations of the parties to such bond. They proceed rather in conformity with the practice of the English Court of Chancery, requiring or dispensing with a bond as the court in the exercise of a sound discretion may deem proper, and if a bond is required, prescribing its condition and penalty. And when an injunction bond is given in a proceeding in a federal court, conditioned to pay such damages as may be recovered in case it shall be decided that the injunction was wrongfully obtained, the condition of the bond is not broken merely by a dissolution of the injunction, and there can be no recovery in the federal courts because of such dissolution alone; and there must first be a recovery or judgment determining the damages, before an action can be maintained against the obligors in the bond.<sup>3</sup>

<sup>1</sup> Colcord v. Sylvester, 66 Ill., 540.      <sup>3</sup> Bein v. Heath, 12 How., 168;

<sup>2</sup> Cook v. Chapman, 3 Stew., 114.      Deakin v. Lea, 11 Biss., 34.

## IV. ASSESSMENT OF DAMAGES.

- § 1657. Practice divergent; equity powerless to award damages in original cause; no damages for final injunction.
1658. New York practice.
1659. Kentucky and Louisiana practice.
1660. The practice in Missouri.
1661. The Illinois practice.
1662. The same.

§ 1657. The practice and modes of procedure to which resort is had for ascertaining and assessing damages upon injunction bonds, after a dissolution, vary largely in the different states, being generally regulated by express legislation, or by local rules of practice. In some of the states, as will be hereafter shown, an expeditious and summary method of procedure has been provided by legislation for determining the damages upon motion or suggestion in the injunction suit, and without the necessity of resorting to an original and independent action upon the bond. There has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference, or otherwise, the amount of damages sustained by the injunction and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond,<sup>1</sup> the undoubted weight both of authority and principle is against the exercise of such a jurisdiction. It is certain that no warrant can be found for its exercise in the former practice of the English High Court of Chancery, and however desirable and convenient such procedure may be and undoubtedly is in practice, the doctrine is too firmly fixed to admit of controversy, that in the ab-

<sup>1</sup>Sturgis v. Knapp, 33 Vt., 486; See Roberts v. Dust, 4 Ohio St., Edwards v. Pope, 3 Scam., 465. 502.

sence of positive legislation a court of equity has no power to afford a remedy upon the bond in the injunction suit, such a power being neither an incident to the general powers of courts of equity, nor consistent with the principles of equity jurisdiction. In the absence, therefore, of legislative authority to the contrary, a court of equity will not, upon dissolving an injunction, enforce payment of damages in the original cause, but will remit the parties aggrieved to their action upon the bond.<sup>1</sup> But while in the absence

<sup>1</sup>*Phelps v. Foster*, 18 Ill., 309; *Merryfield v. Jones*, 2 Curt. C. C., 306; *Garcie v. Sheldon*, 3 Barb., 232; *Lawton v. Green*, 64 N. Y., 826; *Bein v. Heath*, 12 How., 168; *Easton v. New York & L. B. R. Co.*, 11 C. E. Green, 359; *Taylor v. Brownfield*, 41 Iowa, 264; *Greer v. Stewart*, 48 Ark., 21; *Sartor v. Strassheim*, 8 Col., 185. And see *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Fountain v. West*, 68 Iowa, 380. See *dictum* to the contrary in *Russell v. Farley*, 105 U. S., 433. And see to the same effect *Lea v. Deakin*, 11 Biss., 40. In *Phelps v. Foster*, 18 Ill., 309, *Caton, J.*, delivering the opinion of the court, says: "I have, with considerable reluctance, come to the conclusion that the court exceeded its power in awarding damages to the defendant and against the complainant. Except in the case of an injunction to restrain a judgment at law, I can find no warrant in the statute for awarding damages upon the dismissal of an injunction bill, and I can not find authority for sustaining it in the practice of the English Court of Chancery. The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant, without a cross-

bill, and when the pleadings do not justify it. I regret that it is so, for I think this power almost indispensable as a check upon the too free and dangerous use of this writ, which is liable to great abuse, unless the greatest circumspection is used by those invested with the high power of awarding it, which, I regret to say, has not always been the case." In *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, it was held where an interlocutory injunction was granted without any bond or other security, the proceedings being instituted and the injunction obtained in good faith and without any vexatious or wanton motive, that plaintiffs could not be made liable for damages upon the final dissolution of the injunction, since they had never undertaken to pay any damages. The court, therefore, held it proper to dismiss a cross-bill filed by defendant seeking damages on account of the injunction, but declined to pass upon the question of jurisdiction to allow damages in the proceeding in equity, although inclining to the opinion that a court of equity was not a proper forum for determining that question.

of legislative authority for such procedure it is error to assess damages against the sureties upon the bond in the original action to which they are not parties, such a decree will not be reversed for this reason when the sureties do not appeal from or question the decree, the appeal being that of the principal alone.<sup>1</sup> It is to be noted also that an assessment of damages is only allowed as an incident to or the result of the giving of a bond to secure such damages. And when no interlocutory injunction is granted or bond given, but the injunction is allowed as a part of the final decree in the cause, which is afterward reversed upon appeal, it is improper to assess damages for the granting of such injunction.<sup>2</sup>

§ 1658. Under the New York code of procedure the practice prevails of assessing damages upon the dissolution of an injunction by reference, or otherwise as the court may direct, in the original cause. And the party aggrieved by the improper granting of an injunction is entitled as a matter of right upon the dissolution to an order directing the manner in which his damages shall be ascertained.<sup>3</sup> So when the court denies a motion to continue an injunction and vacates the same, and an order is entered discontinuing the action, a reference to assess damages follows almost as a matter of course, even though the order of discontinuance is without costs to either party.<sup>4</sup> But when the bond is conditioned to pay such damages as defendant may sustain by reason of the injunction, "if the court shall finally decide that the plaintiff was not entitled thereto," to warrant a reference for the assessment of damages there must be a final decision in the injunction suit, and that decision must be, in effect, that plaintiff at the time of obtaining

<sup>1</sup> *Daniel v. Daniel*, 39 Ark., 266.

<sup>2</sup> *City of St. Louis v. St. Louis G. Co.*, 82 Mo., 349.

<sup>3</sup> *Jacobs v. Miller*, 11 Hun, 441. A similar practice prevails in South Carolina. *Hill v. Thomas*, 19 S.

C., 230. And the like practice obtains in Wisconsin. *Parish v. Reeve*, 63 Wis., 315.

<sup>4</sup> *Waterbury v. Bouker*, 10 Hun, 262. See also *Palmer v. Foley*, 2 Abb. New Cas., 191.



the injunction was not entitled thereto.<sup>1</sup> And it is held under the New York practice that when judgment is rendered for defendant in an injunction suit, from which plaintiff appeals, giving the necessary bond, defendant is not entitled pending such appeal to an order assessing his damages by reason of the injunction, as there has been no final judgment that plaintiff was not entitled thereto.<sup>2</sup>

§ 1659. Under the Kentucky code the court is authorized upon the dissolution of an injunction against a judgment at law to ascertain and assess the damages and to render judgment thereon immediately and in the same proceeding;<sup>3</sup> and a somewhat similar practice prevails in Louisiana.<sup>4</sup> And the remedy thus provided is held to be an exclusive and not a cumulative remedy for the recovery of special damages upon the dissolution.<sup>5</sup> But this practice prevails in Kentucky only as to injunctions staying proceedings upon a judgment or final order of a court, and in all other cases the remedy for damages must be sought in an action upon the injunction bond.<sup>6</sup>

§ 1660. The practice in Missouri requires the court, upon dissolving an injunction, to enter judgment against the obligors in the bond for the damages occasioned by the injunction; and when the bond is conditioned accordingly, for the payment of such damages as the court shall adjudge upon dissolution, there can be no recovery upon the bond until the court has so adjudged the damages.<sup>7</sup> But

<sup>1</sup> *Benedict v. Benedict*, 15 Hun, 305. As to the English practice in determining damages upon a dissolution, where plaintiff had entered into an undertaking upon the granting of the injunction to abide by any order that the court might make as to damages arising from the injunction, see *Novello v. James*, 5 DeG., M. & G., 876.

<sup>2</sup> *Musgrave v. Sherwood*, 76 N. Y., 194. See also *Benedict v. Benedict*, 76 N. Y., 600.

<sup>3</sup> *Crawford v. Woodworth*, 9 Bush, 745; *Logsdon v. Willis*, 14 Bush, 183.

<sup>4</sup> *Crescent City Co. v. Larrieux*, 30 La. An., 740.

<sup>5</sup> *Crawford v. Woodworth*, 9 Bush, 745.

<sup>6</sup> *Rankin v. Estes*, 13 Bush, 428; *Logsdon v. Willis*, 14 Bush, 183.

<sup>7</sup> *Dorriss v. Carter*, 67 Mo., 544. See, as to the practice in Tennessee in entering judgment against the sureties upon the bond after a dis-

when an interlocutory injunction has been dissolved upon the final hearing, a motion for the assessment of damages should not be allowed at a subsequent term of court without notice to the adverse party.<sup>1</sup>

§ 1661. In Illinois it is provided by statute that upon the dissolution of an injunction the party claiming damages may at any time before final decree file in the original cause a suggestion in writing of the nature and amount of his damages, and the court shall hear evidence and assess the damages accordingly. And it is error to refuse leave to file such suggestion before entry of the final decree.<sup>2</sup> So it is error to assess such damages without any suggestion in writing of the nature and amount thereof.<sup>3</sup> Nor can a decree for damages in such case be sustained unless the evidence upon which the damages are assessed is preserved in the record.<sup>4</sup> Such assessment of damages is not regarded as a new proceeding, but as a continuation of the pending suit, and if either party desires a continuance it should be obtained by affidavit in the usual manner. And it being a continuation of the original chancery proceeding, the refusal to grant a jury trial upon such assessment is not error when the granting of jury trials in chancery suits is made by law to rest in the discretion of

solution, but in the injunction suit, *McKesson v. Hennessee*, 66 N. C., *Coltart v. Ham*, 2 Tenn. Ch., 356; 473.

*Henley v. Cliborne*, 3 Lea, 213.

See, as to the practice in Texas, *Texas & N. O. R. Co. v. White*, 57

*Tex.*, 129; *Allen v. Willis*, 60 *Tex.*, 155. See also *Coates v. Caldwell*,

71 *Tex.*, 19, where it is held, under the statutes of Texas, that upon

dissolving an injunction damages may be assessed against both the

principal and sureties, in the original action, without citation and

without a new suit. And see as to the practice under the code of

North Carolina in assessing damages upon an injunction bond,

<sup>1</sup> *Hoffelmann v. Franke*, 96 Mo., 533.

<sup>2</sup> *Wing v. Dodge*, 80 Ill., 564.

<sup>3</sup> *Forth v. Town of Xenia*, 54 Ill., 210; *Hamilton v. Stewart*, 59 Ill., 330; *Albright v. Smith*, 68 Ill., 181; *Wilson v. Haecker*, 85 Ill., 349.

<sup>4</sup> *Forth v. Town of Xenia*, 54 Ill., 210; *Albright v. Smith*, 68 Ill., 181; *Hamilton v. Stewart*, 59 Ill., 330; *Wilson v. Haecker*, 85 Ill., 349; *Steele v. Boone*, 75 Ill., 457; *Palmer v. Gardiner*, 77 Ill., 143; *Spring v. Collector of Olney*, 78 Ill., 101.

the court.<sup>1</sup> And when upon dissolving an injunction the court grants leave to defendant to file a suggestion of damages, and the suggestion is filed at a subsequent term to which the cause is continued, the court retains jurisdiction for the purpose of fixing the damages.<sup>2</sup> But when plaintiff's right to an injunction is disposed of by a final decree of dissolution, from which he does not appeal, the decree upon the assessment of damages, although incidental to the dissolution, is an absolute money decree and an appeal will lie therefrom.<sup>3</sup>

§ 1662. The Illinois practice, as above stated, has reference only to the assessment of damages against the plaintiff in the injunction suit, and does not authorize a decree for damages against the sureties, which can be obtained only by an action upon the bond. And under a bond conditioned to pay all such damages as shall be awarded against plaintiffs in the event of a dissolution, until there has been an actual assessment or award of damages the condition of the bond is not broken, and there can be no recovery upon the bond.<sup>4</sup> And the right of recovery in such case is limited to the amount of the costs growing out of and connected with the injunction.<sup>5</sup> So when under the statute in force at the time of giving the bond damages upon dissolution must be assessed in the injunction suit as a condition to a right of action upon the bond, a subsequent act of legislature authorizing a recovery upon the bond, notwithstanding a failure to assess damages upon the dissolution, can have no effect upon such bond, already given; unless, therefore, damages have been assessed upon the dissolution, there can be no recovery upon the bond.<sup>6</sup> But the statute applies to cases where the injunction is only a part of or in-

<sup>1</sup> *Holmes v. Stateler*, 57 Ill., 209. 152; *McWilliams v. Morgan*, 70

<sup>2</sup> *Poyer v. Village of Des Plaines*, Ill., 551.  
123 Ill., 111.

<sup>5</sup> *McWilliams v. Morgan*, 70 Ill.,

<sup>3</sup> *Hedges v. Meyers*, 5 Bradw., 551.  
347.

<sup>6</sup> *Alwood v. Mansfield*, 81 Ill.,

<sup>4</sup> *Russell v. Rogers*, 56 Ill., 176; 314; *Deakin v. Lea*, 11 Biss., 34.  
*Brownfield v. Brownfield*, 58 Ill.,

cidental to the principal relief sought, as well as where it is the sole object of the action.<sup>1</sup> And when an injunction is awarded, but no writ actually issues, defendant being present at the making of the order and agreeing to respect it without the formality of a writ, and the bill is afterward dismissed upon demurrer, the court may properly assess the damages, the order for the injunction in such case being regarded as equivalent to the writ.<sup>2</sup> Where, however, an interlocutory injunction is dissolved upon the coming in of the answer, but no decree is made finally dismissing the bill, it is error to assess damages, since there has been no final hearing, and the court may still, upon the final hearing, award a perpetual injunction.<sup>3</sup>

<sup>1</sup> *Darst v. Gale*, 83 Ill., 136.

<sup>3</sup> *Terry v. Hamilton Primary*

<sup>2</sup> *Danville B. & T. Co. v. Parks, School*, 72 Ill., 476.  
88 Ill., 170.

## V. DAMAGES.

- § 1663. Direct and immediate damages only allowed.
1664. Possible profits not allowed; misconduct of receiver in possession not allowed.
1665. Vindictive damages; dissolution conclusive; expense of dissolution; pendency of appeal.
1666. Injunction against judgment; interest.
1667. Dissolution in part; recovery of judgment enjoined.
1668. Injunctions against judgments and executions.
1669. Damages limited by penalty; decree on dissolution conclusive; when obligation construed as several.
1670. Dissolution implies damages; taxable costs.
1671. Sale under trust deed; difference between currency and coin; purchase enjoined; bond in excess of statute.
1672. Suit on note.
1673. Cases affecting real property; rental; crops; emblements.
1674. Injunctions against sales of real estate.
1675. Delay in completion of building.
1676. Loss of time and employment.
1677. Service of injunction unnecessary.
1678. Injunction perpetuated in part; removal of grounds for injunction.
1679. Percentage upon tax enjoined.
1680. Fraudulent sale by judgment debtor.
1681. Sale of patent article.
1682. Nominal and real party.
1683. Dispossession for non-payment of rent.
1684. Discretion of court not reviewed on appeal.

§ 1663. In estimating damages sustained by the improper issuing of an injunction, the courts proceed upon equitable grounds, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed.<sup>1</sup> And where no damages have been actually incurred, none should be assessed.<sup>2</sup> In other words, the liability upon the injunction bond is limited to such

<sup>1</sup> Collins v. Sinclair, 51 Ill., 328;      <sup>2</sup> Uhrig v. St. Louis, 47 Mo., 528.  
Center v. Hoag, 52 Vt., 401; Brown  
v. Jones, 5 Nev., 374.

damages as arise from the suspension or invasion of vested legal rights by the injunction. Speculative and remote damages are not properly allowable, nor are those which are merely consequential, the limit being such damages as flow directly from the injunction as its immediate consequence.<sup>1</sup> Thus, remote and contingent benefits that might have accrued from the increased value of property resulting from the opening of a street which has been enjoined, will not be taken into account in an action upon the bond.<sup>2</sup> And the only damages which can be recovered are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction.<sup>3</sup> So damages for the loss of possible profits which might have accrued to defendant under a contract with a third person, which he was prevented by the injunction from carrying out, have been disallowed as too remote and conjectural and as not being the necessary and proximate result of the injunction.<sup>4</sup> Nor can defendants recover upon the bond unless they can show that they have sustained actual injury by the injunction; and when the injunction is dissolved upon their answer averring that they did not desire or intend to do the act enjoined, they can not recover upon the bond, having sustained no damages by reason of the injunction.<sup>5</sup> But where an injunction operates to delay the sale of property, real and personal, and pending such delay great depreciation occurs in the value of the property, such loss, being regarded as occasioned by the injunction, may be properly included in estimating the damages incurred.<sup>6</sup>

<sup>1</sup> *Steuart v. State*, 20 Md., 97; *Morgan v. Negley*, 53 Pa. St., 153; *Hotchkiss v. Platt*, 8 Hun, 46; *Chicago City R. Co. v. Howison*, 86 Ill., 215; *Livingston v. Exum*, 19 S. C., 223. And see *Brown v. Jones*, 5 Nev., 374; *Collins v. Sinclair*, 51 Ill., 228.

<sup>2</sup> *Steuart v. State*, 20 Md., 97.

<sup>3</sup> *Burgen v. Sharer*, 14 B. Mon., 497.

<sup>4</sup> *Livingston v. Exum*, 19 S. C., 223.

<sup>5</sup> *Bank of Monroe v. Gifford*, 70 Iowa, 580.

<sup>6</sup> *Meysenburg v. Schlieper*, 48 Mo., 426, second edition, 399.

§ 1664. As illustrating the rule limiting the damages recoverable to those which are the direct and immediate result of the injunction, to the exclusion of merely conjectural and speculative damages, it is held, where an injunction restrains the extension of a line of street railway, that, upon its dissolution, damages resulting from the possible profits which might have accrued, had the railway been extended, can not be allowed.<sup>1</sup> So where defendant is enjoined from interfering with or disposing of his property, and a receiver is at the same time appointed over his property, upon dissolution of the injunction defendant is entitled to such damages as are directly caused by the act of divesting him of his property and placing it in the hands of the receiver; but he is not entitled to damages arising from the receiver's negligence and misconduct while in possession, since such damages are not properly attributable to the injunction, and other security was taken therefor.<sup>2</sup>

§ 1665. In the absence of malice in suing out the injunction, vindictive or punitive damages should not be allowed upon dissolution, but the recovery should be measured by simple compensation for the actual loss sustained.<sup>3</sup> But defendant who is injured by an injunction which is afterward dissolved is entitled, in his action upon the bond, to compensation for all loss and injury naturally and fairly referable to the wrongful act of the obligor in obtaining the injunction,<sup>4</sup> and the decree dissolving the injunction is, until reversed, conclusive that it was wrongfully obtained.<sup>5</sup> And in assessing the damages sustained a reasonable sum may be allowed for expense and trouble incurred in procuring a dissolution.<sup>6</sup> But it is improper to award damages for defendant's time and services in procuring the dissolution, or for the mental strain and anxiety which he may

<sup>1</sup> *Chicago City R. Co. v. Howison*, 86 Ill., 215.

<sup>2</sup> *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>3</sup> *Brown's Adm'r v. Tyler*, 34 Tex., 168.

<sup>4</sup> *Smith v. Wells*, 46 Miss., 64.

<sup>5</sup> *Smith v. Wells*, 46 Miss., 64; *Cummings v. Mugge*, 94 Ill., 186.

<sup>6</sup> *Pargoud v. Morgan*, 2 La., 100.

have suffered by reason of the injunction.<sup>1</sup> And in a suit upon the bond, the recovery for costs and expenses incurred by reason of the injunction is limited to such as accrued between the time of issuing the writ and its dissolution,<sup>2</sup> and no damages are allowed during the pendency of an appeal to a higher court.<sup>3</sup>

§ 1666. Where a judgment at law has been enjoined, the judgment creditor is entitled upon dissolution to damages only upon so much of his judgment as remained due, and the collection of which was delayed by the injunction.<sup>4</sup> But in estimating damages after the dissolution of an injunction against a judgment, they should be computed upon the aggregate amount of principal, interest and costs due at the time the injunction took effect.<sup>5</sup> And interest upon the amount of the judgment during the time it was enjoined, or upon the whole sum, the collection of which was suspended by injunction, is allowable.<sup>6</sup> But after the dissolution of an injunction to a judgment at law, the judgment creditor will not, in an action upon the bond, be allowed interest on the amount of the judgment, if it has been fully satisfied.<sup>7</sup> Where, however, payment of money justly due has been enjoined, interest is recoverable as a matter of right up to the time of payment into court on dissolution of the injunction.<sup>8</sup> But in an action upon an injunction bond given in a penal sum, it is error to render judgment for interest upon the penalty in the bond.<sup>9</sup> And where one has been frustrated and hindered in the collection of his debt by the wrongful suing out of an injunction against his execution, the surety in the bond is liable for damages

<sup>1</sup> *Cook v. Chapman*, 41 N. J. Eq., 152. See also *Edwards v. Bodine*, 11 Paige, 223.

<sup>2</sup> *Wallis v. Dilley*, 7 Md., 237.

<sup>3</sup> *Woodson v. Johns*, 3 Munf., 230; *Jeter v. Langhorn*, 5 Grat., 193.

<sup>4</sup> *Southerland v. Crawford*, 2 J. J. Marsh., 370.

<sup>5</sup> *Washington's Ex'r v. Parks*, 6 Leigh, 581.

<sup>6</sup> *Gist v. McGuire*, 4 Har. & J., 9; *Aldrich v. Reynolds*, 1 Barb. Ch., 613.

<sup>7</sup> *Grundy v. Young*, 2 Cranch C. C., 114.

<sup>8</sup> *Wallis v. Dilley*, 7 Md., 237.

<sup>9</sup> *Rhea v. McCorkle*, 11 Heisk., 415.



thereby incurred, not exceeding the penalty named in the bond.<sup>1</sup> Where, as in some of the states, it is provided by statute that a certain percentage of judgments enjoined shall be assessed as damages on the dissolution, one not a party to the judgment, but who enjoins proceedings under it, is liable for the percentage as if he were a party.<sup>2</sup> It is held, however, that statutes allowing such a percentage of damages upon the dissolution of an injunction against a judgment at law are to be construed strictly as applicable to judgments alone, and not as including injunctions against decrees in chancery.<sup>3</sup> And a decree allowing a larger percentage upon the judgment as damages than that fixed by statute will be reversed for error.<sup>4</sup> So under a statute requiring a bond conditioned for the payment of all money and costs due or to become due to the plaintiff in the proceeding at law which is enjoined, and all costs and damages which shall be awarded upon a dissolution of the injunction, the statute authorizing the court upon dissolution to assess damages to an amount not exceeding ten per cent. of the sum improperly enjoined, it is error to include in the assessment of damages, made in the same cause upon dissolution, the entire amount of the judgment enjoined.<sup>5</sup> And when a bond given upon enjoining a judgment at law is conditioned to pay all sums of money, damages and costs which shall be awarded if the injunction is dissolved, it will not embrace the amount of the judgment and costs enjoined.<sup>6</sup> So upon the dissolution of an injunction against a void judgment damages will not be allowed, since, the judgment being void, no damages can be sustained by a stay of proceedings thereunder.<sup>7</sup>

<sup>1</sup> *Day v. Martin*, 7 La., 365.

*Joslyn v. Dickerson*, 71 Ill., 25.

<sup>2</sup> *Claytor v. Anthony*, 15 Grat., 518.

See as to damages upon an injunction bond under the Illinois statute of 1861, *Rees v. Peltzer*, 1 Bradwell, 315.

<sup>3</sup> *Head v. Perry*, 1 Monr., 253; *Martin v. Wade's Ex'rs*, 5 Monr., 77.

<sup>6</sup> *Browning v. Porter*, 2 McCrary, 581.

<sup>4</sup> *Camp v. Bryan*, 84 Ill., 250.

<sup>5</sup> *Roberts v. Fahs*, 6 Ill., 268;

<sup>7</sup> *Wingfield v. McLure*, 48 Ark.,

§ 1667. When an injunction against a judgment at law is dissolved in part and perpetuated as to the residue, it is proper to award damages pertaining to the amount of the judgment as to which the injunction was dissolved.<sup>1</sup> But where a judgment is enjoined upon a bond conditioned for payment of the judgment with costs and damages in the event of a dissolution, to warrant a recovery of the judgment in an action upon the injunction bond after dissolution, it should be averred that it has not been paid.<sup>2</sup>

§ 1668. Where a judgment creditor is enjoined from proceeding against certain specific property claimed by a third person, a stranger to the original suit, without interfering with the remedy against other property or against the person of the debtor, who is not made a party to the bill, the court will not, on dissolving the injunction and dismissing the bill, decree the amount of the judgment as a penalty against complainants.<sup>3</sup> So if the injunction is dissolved only as to a portion of the property affected by the writ, which portion has not depreciated in value, and is afterward sold on execution and the proceeds of the sale are applied on the judgments, complainant should not be decreed to pay both the amount of the judgments and the penalty.<sup>4</sup> And where complainant enjoins the sale of his own property under executions against a third person, leaving the executions otherwise in full force as to the debtor's property, the measure of damages in an action upon the bond is the real loss actually incurred, with costs, and not the

510. In Louisiana it is held that damages will not be allowed upon the dissolution of an injunction except in cases where the execution of a money judgment is enjoined. *Green v. Reagan*, 32 La. An., 974; *King v. La Branche*, 35 La. An., 305. See also *Carroll v. Readheimer*, 35 La. An., 374.

<sup>1</sup> *Perry v. Kearney*, 14 La. An., 401.

<sup>2</sup> *Crawford v. Woodworth*, 9

*Bush*, 745. It is held in Virginia that damages on the dissolution of an injunction against a judgment at law form, as to the party obtaining the injunction, a part of the judgment, and are embraced in its lien. *Michaux's Adm'r v. Brown*, 10 Grat., 612.

<sup>3</sup> *Portsmouth Turnpike Co. v. Byington*, 12 Ohio, 114.

<sup>4</sup> *Teaff v. Hewitt*, 1 Ohio St., 511.

amount due on the executions.<sup>1</sup> So upon the dissolution of an injunction restraining the sale of personal property under execution, some of which is liable to execution, the measure of damages is the value of that portion of the property which was subject to execution.<sup>2</sup>

§ 1669. Where the practice prevails of decreeing damages upon the dissolution, it is held that the court can not go beyond the bond and award greater damages than the penalty therein fixed.<sup>3</sup> And when a court of equity has awarded damages upon dissolving an injunction, its decree is held to be conclusive as to the amount which can be recovered in an action upon the bond. In such action the surety is bound by the decree and will not be permitted to show in defense that less damages were sustained than the amount awarded by the decree, since this would re-open the whole subject-matter of the decree.<sup>4</sup> And if the damages to the different parties against whom the injunction issued are several and distinct in their nature, the bond will be held to be a several obligation, although its language might be construed to cover merely an obligation to the defendants jointly.<sup>5</sup>

§ 1670. The payment of damages is considered as a penalty for failure to sustain an injunction, and it is held that the order of dissolution necessarily imports that the damages are to be paid, unless it expressly remits them.<sup>6</sup> And where the bond is conditioned for the payment of such damages as the court may award, and the court simply dissolves the injunction and dismisses the bill without decreeing any damages, the order of dissolution necessarily implies that the damages must be paid.<sup>7</sup> So a bond condi-

<sup>1</sup> *Hord v. Trimble*, 1 Lit., 413.

<sup>6</sup> *Claytor v. Anthony*, 15 Grat.,

<sup>2</sup> *Coates v. Caldwell*, 71 Tex., 19. 518.

<sup>3</sup> *Sturgis v. Knapp*, 33 Vt., 486;  
*Lawton v. Green*, 64 N. Y., 326,  
modifying *S. C.*, 5 Hun, 157.

<sup>7</sup> *Claytor v. Anthony*, 15 Grat.,  
518. But see *Ashby v. Chambers*,  
3 Dana, 437, where it is held that  
there can be no recovery upon an  
injunction bond conditioned for  
the payment of such damages as

<sup>4</sup> *Lothrop v. Southworth*, 5 Mich.,  
436.

<sup>5</sup> *Sturgis v. Knapp*, 33 Vt., 486.

tioned for the payment of such costs and damages as may be awarded against complainant in case the injunction is dissolved authorizes a recovery of the damages and costs incurred, whether awarded upon the dissolution, or afterward, or in a different proceeding.<sup>1</sup> And in computing damages upon the dissolution of an injunction, the taxable costs of so much of the proceedings in the injunction suit as were necessary to procure the dissolution may properly be included.<sup>2</sup>

§ 1671. An injunction against the sale of property under a deed of trust or mortgage is not necessarily a proceeding restraining the collection of money, and damages in such case are not to be estimated under a statute prescribing a fixed rate of damages on the dissolution of injunctions restraining the payment of money, but they should be computed according to the degree of injury actually sustained.<sup>3</sup> In all such cases the amount of injury should be determined by proper evidence, taking into consideration the probable amount that might have been realized had the sale not been enjoined, the value of money at the time, and such other circumstances as tend to show the actual damages sustained.<sup>4</sup> And the depreciation in value of the mortgaged property pending the injunction is a proper element of damages in an action upon the bond.<sup>5</sup> But it is improper to allow the difference in the value of United States treasury notes at the time of granting and of dissolving the injunction, as compared with the market value of gold coin.<sup>6</sup> The court may, however, upon dissolving an injunction against

shall be awarded, where none have been decreed upon the dissolution of the injunction.

<sup>1</sup> *Hibbard v. McKindley*, 28 Ill., 240; *Brown v. Gorton*, 31 Ill., 416; *Edwards v. Edwards*, *ib.*, 474; *Roberts v. Dust*, 4 Ohio St., 502.

<sup>2</sup> *Aldrich v. Reynolds*, 1 Barb. Ch., 613. See also upon the ques-

tion of costs, *Lillie v. Lillie*, 55 Vt., 470.

<sup>3</sup> *Kennedy's Admr'x v. Hammond*, 16 Mo., 341.

<sup>4</sup> *St. Louis v. Alexander*, 23 Mo., 483. And see *Marsh v. Morton*, 75 Ill., 621.

<sup>5</sup> *Bolling v. Tate*, 65 Ala., 417.

<sup>6</sup> *Riddlesbarger v. McDaniel*, 38 Mo., 138.

a sale of real estate under a foreclosure decree, allow in assessing the damages a reasonable attorney's fee for defending the injunction suit, and may also allow the costs of advertising the sale.<sup>1</sup> And upon the dissolution of an injunction against a sale of land under a trust deed in the nature of a mortgage, the trustee having merely the naked legal title for the purposes of the trust can not release the damages occasioned by the injunction, and the beneficiary or *cestui que trust* may recover damages upon the bond, notwithstanding an attempted release of such damages by the trustee.<sup>2</sup> If a purchaser of land under a deed of trust is enjoined from taking possession, to which he is entitled, upon dissolution of the injunction the rule of damages will be the rental value of the premises while the injunction was in force.<sup>3</sup> But where a sale under a deed of trust is enjoined, the statute requiring a bond conditioned for the payment of damages and costs only, but the bond is given conditioned for the payment of the mortgage indebtedness, there can be no recovery of such indebtedness upon the bond, and the recovery will be limited to what would have been allowed had the condition complied with the statute.<sup>4</sup>

§ 1672. Upon the dissolution of an injunction to an action at law on a promissory note, the bond being conditioned for the payment of all damages which may result to the party enjoined by reason of the injunction, plaintiffs should be allowed their taxable costs during the time they were delayed by the injunction, both in the action at law and in the suit in equity, provided such costs can not be realized from the parties prosecuting the injunction suit.<sup>5</sup>

§ 1673. In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership over his real property, the courts are not governed by arbitrary rules, but proceed upon

<sup>1</sup> *Cummings v. Burleson*, 78 Ill., 281.

<sup>2</sup> *O'Reilly v. Miller*, 52 Mo., 210.

<sup>3</sup> *Hosmer v. Campbell*, 98 Ill., 572.

<sup>4</sup> *Menken v. Frank*, 57 Miss., 732.

<sup>5</sup> *Derry Bank v. Heath*, 46 N. H., 524.

equitable principles, the defendant being entitled to such damages as are the necessary and proximate result of such deprivation.<sup>1</sup> And the loss of timber, wood and sand which have been taken away from the premises pending the injunction, and while the owner was deprived of the right to protect his land from invasion, may be included in the assessment of damages.<sup>2</sup> So the loss of the use and rental of the premises during the time defendant was enjoined is a proper element of damages to be recovered in an action upon the bond.<sup>3</sup> So, too, damages for the crops which defendant was prevented by the injunction from harvesting may properly be allowed,<sup>4</sup> as well as waste committed upon the premises while defendants were deprived of their possession by the injunction.<sup>5</sup> And in such cases the rule of damages is not limited to what the land was worth to plaintiff in the injunction suit, but the damages actually sustained by defendants by being kept out of possession will be allowed; and evidence showing that defendants lost their crops for the entire season, by reason of being deprived of the land, is admissible.<sup>6</sup> And where a mortgagor obtains an injunction to prevent the mortgagee from selling the premises under a decree in foreclosure, and pending the injunction the mortgagor removes emblements from the premises, the value of the emblements should be included in the damages awarded to the mortgagee upon dissolution.<sup>7</sup> So when the sale of lands is delayed by injunction, interest on the purchase price received at the sale after dissolution of the injunction may be allowed as damages, such loss

<sup>1</sup> *Alexander v. Colcord*, 85 Ill., 323; *Banks v. State*, 62 Md., 88.

<sup>2</sup> *Alexander v. Colcord*, 85 Ill., 323.

<sup>3</sup> *Smith v. Wells*, 46 Miss., 64; *Hosmer v. Campbell*, 98 Ill., 572; *Richardson v. Allen*, 74 Ga., 719. But see *Hill v. Hill*, 59 Vt., 125.

<sup>4</sup> *Allen v. Brown*, 5 Lans., 511.

<sup>5</sup> *Richardson v. Allen*, 74 Ga., 719.

<sup>6</sup> *Edwards v. Edwards*, 31 Ill., 474.

<sup>7</sup> *Aldrich v. Reynolds*, 1 Barb. Ch., 613. As to the proper damages where defendant has by the injunction been prevented from clearing certain land, and from carrying out a contract to furnish a given amount of lumber, see *McKinzie v. Mathews*, 59 Mo., 99.

being the direct result of the injunction.<sup>1</sup> And a judgment in an action of trespass between the parties, establishing the right of defendant in the injunction suit to the land, is conclusive evidence in an action by such defendant upon the injunction bond that he was entitled to the land and was injured by the injunction.<sup>2</sup>

§ 1674. Where plaintiff, being in possession of and claiming title to real estate, enjoins its sale under execution against his vendor, upon the dissolution of the injunction defendant is not entitled to judgment against plaintiff, upon the injunction bond, for the amount of the debt enjoined, it not being the plaintiff's debt or one for which he is in any way liable.<sup>3</sup> And where one claiming title to real estate enjoins its sale under execution against another upon a judgment to which plaintiff in the injunction suit was not a party, it is error upon dissolving the injunction to award as damages the amount of such judgment. And this is true, even under a statute authorizing damages to be assessed upon the amount of money enjoined, when the injunction restrains the collection of money; since the injunction in the case stated is not to restrain the collection of money, but a sale of land, under an execution to which plaintiff was not a party.<sup>4</sup> So where a vendor of land is enjoined from completing his sale, the injury which he suffers being the deprivation of his money, the law will not regard collateral or consequential damages arising from delay in receiving the money, but will only allow interest upon the money itself.<sup>5</sup>

§ 1675. While it is the duty of defendants against whom a temporary injunction is granted to do all that a prudent man would do to reduce plaintiff's damages in the event of

<sup>1</sup> *Hill v. Thomas*, 19 S. C., 230.

<sup>2</sup> *Banks v. State*, 62 Md., 88.

<sup>3</sup> *Moore v. Hallum*, 1 Lea, 511.

<sup>4</sup> *Carlin v. Hudson*, 12 Tex., 202;  
*Griffin v. Chadwick*, 44 Tex., 409,  
disaffirming *Gault v. Goldthwaite*,  
34 Tex., 104.

<sup>5</sup> *Graham v. Campbell*, 7 Ch. D.,  
490. As to damages in case of an  
injunction against the cutting of  
timber, see *Lillie v. Lillie*, 55 Vt.,  
470.

a dissolution, yet if they have acted in good faith they will not be held rigidly to the adoption of such a course as would certainly have saved plaintiff from loss. And where defendants are enjoined from tearing down a wall for the erection of a new building, and are thereby delayed in the completion of their building, it is proper to include in the damages loss in rent of the building, increased cost of labor and materials, and counsel fees upon the motion to dissolve and upon an appeal from the order of dissolution.<sup>1</sup>

§ 1676. When it is sought in an action upon an injunction bond to recover damages for loss of time and employment, in the absence of any evidence showing that plaintiffs used diligence in attempting to find other employment during the period in which they were enjoined, damages will not be allowed for such loss.<sup>2</sup>

§ 1677. An injunction bond being for the benefit of all the defendants enjoined, regardless of whether they are served with process, to entitle one to damages upon a dissolution it is sufficient that he has rendered himself obedient to the injunction, although the writ may not have been served upon him, and he is then entitled to a reference to ascertain his damages.<sup>3</sup>

§ 1678. When an injunction is perpetuated in part plaintiff should not be required to pay the costs, since he is the prevailing party so far as the injunction is allowed to stand, and it is error to decree costs against him.<sup>4</sup> And in general, wherever an injunction is rightfully obtained upon sufficient grounds, and is afterward dissolved upon the removal of those grounds, complainant should not be required to pay damages upon the dissolution, having had good cause for the injunction in the first instance.<sup>5</sup> Thus, where judgments

<sup>1</sup> *Roberts v. White*, 73 N. Y., 375.

<sup>2</sup> *Muller v. Fern*, 35 Iowa, 420.

<sup>3</sup> *Cumberland Co. v. Hoffman Co.*, 39 Barb., 16.

<sup>4</sup> *Ross v. Gordon*, 2 Munf., 289; *Hoofman v. Marshall*, 1 J. J. Marsh., 64.

<sup>5</sup> *McKoy v. Chiles*, 5 Monr., 259;

*Payne v. Wallace*, 6 Monr., 381;

*Porter v. Scobie*, 5 B. Monr., 387;

*Lampton v. Usher's Heirs*, 7 B.

Monr., 57; *Fishback v. Williams*, 3

Bibb, 342.



for the purchase money of real estate are enjoined on the ground of defective title, and a dissolution is granted upon the title being made good, no damages should be allowed against complainant.<sup>1</sup>

§ 1679. Under a statute authorizing the court upon dissolving an injunction against the collection of money, if satisfied that it was obtained for delay, to assess damages at a given percentage upon the amount enjoined, an injunction against the collection of a tax is regarded as falling within the statute, and the court may award damages accordingly upon dissolving such injunction.<sup>2</sup>

§ 1680. Where a judgment debtor makes a fraudulent sale of his goods, without consideration, and still retaining possession, and the vendee under such fraudulent sale obtains an injunction against a sale of the goods under execution against the debtor, upon dissolving such injunction it is the duty of the court to award the highest damages allowed by law for such an abuse of the equitable remedy of the court.<sup>3</sup>

§ 1681. When defendants are restrained from selling an alleged patented article, upon the ground that plaintiffs have the sole control of its sale as grantees of the patentees, but plaintiffs fail to maintain their injunction because of their failure to prove that the article was patented, plaintiffs and their sureties will be held liable in an action upon the bond for the damages thereby sustained.<sup>4</sup>

§ 1682. When proceedings at law conducted for the benefit of one person, but in the name of another, are restrained by an injunction which is not directed to the real party in interest, but only to the nominal party, the damages and expenses incurred by the real party in interest in procuring a dissolution of the injunction will be presumed

<sup>1</sup> *Porter v. Scobie*, 5 B. Mon., 387; *Lampton v. Usher's Heirs*, 7 B. Mon., 57; *Fishback v. Williams*, 3 Bibb, 342.

<sup>2</sup> *Rio Grande R. Co. v. Scanlan*, 44 Tex., 649.

<sup>3</sup> *Pendleton v. Eaton*, 23 La. An., 435.

<sup>4</sup> *Wentzel v. Robinson*, 23 La. An., 451.

in law to have been incurred by the defendant of record, the nominal party, and may be recovered in his name for the benefit of the real party in interest.<sup>1</sup>

§ 1683. Where an injunction is obtained to prevent the dispossession of plaintiff for non-payment of rent, upon the dissolution of the injunction the amount of rent at the rate reserved in the lease, while plaintiff kept possession, is a fair measure of damages.<sup>2</sup>

§ 1684. Under a statute conferring upon the court discretionary power to award damages upon dissolving an injunction, not exceeding a certain amount, a court of appellate jurisdiction will not ordinarily review the exercise of that discretion, even though the amount assessed is much less than the limit fixed by the statute.<sup>3</sup>

<sup>1</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282.

<sup>2</sup> *Bray v. Poillon*, 4 Thomp. & C., 663.

<sup>3</sup> *Moore v. Granger*, 30 Ark., 574. See further as to the discretion of the inferior court in disallowing

damages upon a total or partial dissolution, *Russell v. Farley*, 105 U. S., 433. As to the extent to which damages will be allowed against minors upon the dissolution of an injunction obtained by them, see *Greig v. Eastin*, 30 La. An., 1130.

## VI. COUNSEL FEES.

- § 1685. General rule as to allowance of counsel fees.  
 1686. Test as to allowance.  
 1687. When allowed for final hearing; not allowed for appeal.  
 1688. Limitations upon the general doctrine.  
 1689. Fees after dissolution not allowed.  
 1690. Further limitations.  
 1691. City enjoined from collecting taxes.  
 1692. Not allowed when injunction expires by its terms; contingent fee not allowed.

§ 1685. A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, or in the assessment of damages in the injunction suit after dissolution where that practice prevails, if the injunction was improperly or wrongfully sued out, the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case. Counsel fees in such cases are regarded as a proper subject of consideration in estimating the damages incurred, the loss being as direct and immediate as any other.<sup>1</sup> And under a statute requiring the court,

<sup>1</sup> *Behrens v. McKenzie*, 23 Iowa, 333; *Edwards v. Bodine*, 11 Paige, 224; *Coates v. Coates*, 1 Duer, 664; *Corcoran v. Judson*, 24 N. Y., 106; *Aldrich v. Reynolds*, 1 Barb. Ch., 613; *Ah Thaie v. Quan Wan*, 3 Cal., 216; *Prader v. Grim*, 13 Cal., 585; *Garrett v. Logan*, 19 Ala., 344; *Derry Bank v. Heath*, 45 N. H., 524; *Ryan v. Anderson*, 25 Ill., 372; *Collins v. Sinclair*, 51 Ill., 328; *McRae v. Brown*, 12 La. An., 181; *Aiken v. Leathers*, 37 La. An., 482; *Wittich v. O'Neal*, 22 Fla., 592; *Parker v. Bond*, 5 Mont., 1; *Cook v. Chapman*, 41 N. J. Eq., 152; *Richardson v. Allen*, 74 Ga., 719; *Livingston v. Exum*, 19 S. C., 223; *Brown v. Jones*, 5 Nev., 374; *Rose v. Post*, 56 N. Y., 603; *Baylis v. Scudder*, 6 Hun, 300; *Cummings v. Burleson*, 78 Ill., 281; *Joslyn v. Dickerson*, 71 Ill., 25; *Raupman v. City of Evansville*, 44 Ind., 392; *Buford v. Keokuk N. L. P. Co.*, 3 Mo. App., 159; *Hannibal & St. J. R. Co. v. Shepley*, 1 Mo. App., 254; *Bohan v. Casey*, 5 Mo. App., 101. See also *Park v. Musgrave*, 6 Hun, 223; *Miles v. Edwards*, 6 Mont., 180; *Beeson v. Beeson*, 59 Ind., 97. But, notwithstanding the well settled doctrine allowing reasonable counsel fees, it is held by the Supreme Court of the United States, that in an action upon the bond to recover damages after a dissolution, counsel fees incurred by de-

after dissolving an injunction, upon a suggestion of damages being filed by the injured party, to assess the damages sustained by reason of the injunction, it is not error to include counsel fees for defending the injunction suit.<sup>1</sup>

§ 1686. The allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that defendant has been compelled to employ aid in ridding himself of an unjust restriction, which has been placed upon him by the action of plaintiff.<sup>2</sup> And the true test with regard to the allowance of counsel fees as damages would seem to be, that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered; but if the injunction is only ancillary to the principal object of the action and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees can not be recovered.<sup>3</sup> Thus, where the principal purpose of the action was to adjudicate a question of title, and an interlocutory injunction was obtained, but no motion was ever made or argued for its dissolution, and the case was finally tried upon its merits upon the question of title and decided in favor of defendants, and the injunction was thereupon dis-

fendant in the injunction suit can not be allowed, although the bond be conditioned for the payment of all damages and costs that may be occasioned by the injunction. The reasoning upon which this conclusion is based is, that there is no fixed standard for determining what should be allowed as counsel fees, and that their allowance is forbidden by the analogies of the law, and by sound public policy. *Oelrichs v. Spain*, 15 Wal., 211. And a similar doctrine prevails in Arkansas and in Pennsylvania, where counsel fees are not allowed. *Oliphint v. Mansfield*, 86 Ark., 191;

*Sensenig v. Parry*, 113 Pa. St., 115. See also *New National T. Co. v. Dulaney*, 86 Ky., 516.

<sup>1</sup> *Misner v. Bullard*, 43 Ill., 470.

<sup>2</sup> *Buford v. Keokuk N. L. P. Co.*, 3 Mo. App., 159; *Bolling v. Tate*, 65 Ala., 417.

<sup>3</sup> *Noble v. Arnold*, 23 Ohio St., 264; *Riddle v. Cheadle*, 25 Ohio St., 278; *Langworthy v. McKelvey*, 25 Iowa, 48; *Carroll County v. Iowa R. L. Co.*, 53 Iowa, 685; *Blair v. Reading*, 99 Ill., 600; *Newton v. Russell*, 88 N. Y., 527; *Randall v. Carpenter*, 88 N. Y., 293. See also *Reece v. Northway*, 58 Iowa, 187; *Thurston v. Haskell*, 81 Me., 303.

solved by virtue of the judgment upon the main controversy, it was held that counsel fees for the dissolution could not be recovered in an action upon the bond.<sup>1</sup> So where the principal contest upon the hearing was not with reference to the injunction, but concerning a question of title, the injunction being only incidental thereto, and the counsel fees incurred upon the trial would have been incurred in the absence of any injunction, it was held that they could not be included in the damages.<sup>2</sup> Nor will such fees be allowed when no motion to dissolve was made and when the fees proven were for the preparation and management of the case upon the final hearing, and when it is not shown that any portion of such expense was caused by reason of the temporary injunction.<sup>3</sup> Nor will such fees be allowed when it is not shown that the injunction rendered the trial of the cause more difficult than it would otherwise have been, or that it increased the expense of defending the action.<sup>4</sup> So counsel fees for preparing affidavits to be used upon a motion to dissolve are properly disallowed, when it is not shown that such affidavits were actually used, and when the injunction was dissolved because of the insufficiency of the petition upon which it was granted.<sup>5</sup> When, however, the only relief sought in the action is an injunction counsel fees may be recovered as to the entire suit.<sup>6</sup> And when the hearing upon the motion to dissolve necessarily presents all the material issues in the case, and renders it necessary to dispose of the entire controversy upon such motion, counsel fees for such services are properly allowed.<sup>7</sup>

§ 1687. Where a motion for a dissolution is properly made by defendant and is denied, not upon the merits, but because the court in its discretion declines to go into the

<sup>1</sup> *Allport v. Kelley*, 2 Mont., 343.

<sup>4</sup> *Allen v. Brown*, 5 Lans., 511.

<sup>2</sup> *Disbrow v. Garcia*, 52 N. Y., 654.

<sup>5</sup> *Ellwood M. Co. v. Rankin*, 70 Iowa, 403.

<sup>3</sup> *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y., 335; *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>6</sup> *Swan v. Timmons*, 81 Ind., 243.

<sup>7</sup> *Hammerslough v. Kansas City B. L. & S. Association*, 79 Mo., 80.

merits before the final hearing, and upon such final hearing the injunction is dissolved, the expenses of the motion to dissolve are properly allowable as damages. And in such case, the final trial being necessary to dissolve the injunction and defendant being required to submit to it until such hearing, counsel fees for the trial may be allowed.<sup>1</sup> So counsel fees have been allowed for a motion to dissolve when made in good faith, although the court declined to hear the motion and did not dissolve the injunction until the final hearing.<sup>2</sup> But the fees should be limited to services in procuring a dissolution in the court below, and should not include services upon an appeal after the dissolution of the injunction.<sup>3</sup>

§ 1688. It is improper to allow as damages counsel fees for the expense incurred in trying the entire cause, irrespective of the injunction, and the fees should be limited to such as pertain to the dissolution.<sup>4</sup> And the court should only allow a fair and reasonable compensation to defendant, in assessing his damages upon a dissolution, for money actually paid to counsel or for a liability fairly and honestly incurred in procuring the dissolution. Nor should fees be allowed for other services than those pertaining to the dissolution, nor when defendant has managed his own case, and when he has neither paid nor become liable for any fees.<sup>5</sup> And where no counsel fees have been paid, the defendant, a municipal corporation, defending by its salaried attorney without fee for his services, no counsel fees should

<sup>1</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282.

<sup>2</sup> *Wallace v. York*, 45 Iowa, 81. But see *Allen v. Brown*, 5 Lans., 511.

<sup>3</sup> *Ellwood M. Co. v. Rankin*, 70 Iowa, 403. See, *contra*, *Bolling v. Tate*, 65 Ala., 417. As to the right to counsel fees for procuring a partial dissolution or a modification of the injunction, see *Ford v. Loomis*, 62 Iowa, 586.

<sup>4</sup> *Elder v. Sabin*, 66 Ill., 126; *Blair v. Reading*, 99 Ill., 600; *Bustamente v. Stewart*, 55 Cal., 115; *Hill v. Thomas*, 19 S. C., 230; *Olds v. Cary*, 13 Oregon, 362; *Bolling v. Tate*, 65 Ala., 417; *Newton v. Russell*, 87 N. Y., 527; *Randall v. Carpenter*, 88 N. Y., 293; *Campbell v. Metcalf*, 1 Mont., 373.

<sup>5</sup> *Jevne v. Osgood*, 57 Ill., 340.

be allowed.<sup>1</sup> Nor can defendant lay the foundation for larger damages by employing an unnecessary number of counsel.<sup>2</sup> But to warrant a court in the allowance of counsel fees for procuring a dissolution, it would seem not to be necessary that the fees should have been actually paid; it will suffice that the services have been rendered and the liability incurred.<sup>3</sup> It must, however, be shown that the services were actually rendered and that they were equal to the amount allowed, and such evidence should be preserved in the record.<sup>4</sup> And fees will not be allowed in the absence of proof of payment or of any liability or charge actually incurred therefor.<sup>5</sup> But when, upon dissolving an injunction, damages have been allowed defendant for counsel fees, the fact that the attorney appeared in the court below and argued the motion to dissolve may be taken as sufficient evidence of a retainer.<sup>6</sup>

§ 1689. When the bond is conditioned for the payment of all damages sustained by suing out an injunction if the same is dissolved, it is not proper to allow counsel fees for services rendered in the progress of the cause to a final decree after dissolution, since such fees are not properly damages occasioned by suing out the injunction; they will not,

<sup>1</sup> *Uhrig v. St. Louis*, 47 Mo., 528. And under the statute of Illinois allowing damages upon the dissolution of injunctions, fees to counsel who have rendered services *ex officio*, such as the attorney-general of the state, or the public prosecutor, can not be allowed as damages. *Wilson v. Weber*, 3 Bradw., 125.

<sup>2</sup> *Collins v. Sinclair*, 51 Ill., 328; *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>3</sup> *Garrett v. Logan*, 19 Ala., 344; *McRae v. Brown*, 12 La. An., 181; *Meaux v. Pittman*, 35 La. An., 360; *Underhill v. Spencer*, 25 Kan., 71; *Wittich v. O'Neal*, 22 Fla., 592; *Brown v. Jones*, 5 Nev., 374; *Noble*

*v. Arnold*, 23 Ohio St., 264. But see, *contra*, *Wilson v. McEvoy*, 25 Cal., 169; *Prader v. Grimm*, 28 Cal., 11.

<sup>4</sup> *Delahanty v. Warner*, 75 Ill., 185.

<sup>5</sup> *Packer v. Nevin*, 67 N. Y., 550; *Fisher v. Tribby*, 5 Bradw., 335.

<sup>6</sup> *Directors v. Trustees*, 66 Ill., 247. As to the amount to be allowed as counsel fees, when the only service rendered was in presenting to the court, upon the motion for dissolution, the question of the construction of a statute, see *Spring v. Collector of Olney*, 78 Ill., 101.

therefore, be allowed as damages, even though the object of the suit is to obtain a perpetual injunction.<sup>1</sup>

§ 1690. While, as has thus been shown, counsel fees pertaining to the dissolution are properly allowable in assessing damages, yet the damages on this account should be limited to such legal services as are necessary to procure a dissolution, and should not include services upon a cross-bill filed by defendant, which raises other issues than those pertaining to the injunction and which are not necessary to its determination.<sup>2</sup> And when no expenses are incurred by the dissolution which are separable from and not chargeable as the necessary expenses incurred by defendants in revesting themselves with title to the lands in controversy by a cross-bill, no damages should be allowed upon dissolution.<sup>3</sup>

§ 1691. Where a city is enjoined from the collection of taxes to pay interest upon its bonds, upon dissolving the injunction it is proper to allow reasonable damages, including counsel fees; and the fact that one of the city's attorneys is himself interested in such bonds will not deprive the city of its right to damages.<sup>4</sup>

§ 1692. In an action upon the bond counsel fees for dissolving the injunction will not be allowed when it expired by its own terms and by operation of law, and when no steps were taken to procure its dissolution, and no expenses incurred for counsel fees.<sup>5</sup> Nor can a contract for a contingent or speculative fee for services as counsel be made the basis on which to charge the adverse party in an assessment of damages upon the dissolution of an injunction, since such assessment must rest upon equitable grounds and can not exceed the damages actually sustained.<sup>6</sup>

<sup>1</sup> *Robertson v. Robertson*, 58 Ala., 68; *Porter v. Hopkins*, 63 Cal., 53.      <sup>4</sup> *Mason v. City of Shawneetown*, 77 Ill., 533.

<sup>2</sup> *Alexander v. Colcord*, 85 Ill., 323.      <sup>5</sup> *Kittle v. De Lamater*, 7 Neb., 70.

<sup>3</sup> *Wilson v. Haecker*, 85 Ill., 349.      <sup>6</sup> *Hedges v. Meyers*, 5 Bradw., 347.



## CHAPTER XXXIII.

### OF APPEALS.

- I. APPEALS FROM THE GRANTING OF INJUNCTIONS . . . § 1693
- II. APPEALS FROM THE DISSOLUTION OF INJUNCTIONS. . . 1702

#### I. APPEALS FROM THE GRANTING OF INJUNCTIONS.

- § 1693. Appeal not usually allowed independent of statute.
- 1694. Question dependent upon statute.
- 1695. The doctrine in Louisiana.
- 1696. Appellate courts averse to interfering with action of court below.
- 1697. When bill taken as true; affidavits should be preserved.
- 1698. Effect of appeal as to act enjoined.
- 1699. Effect of writ of error from United States Supreme Court.
- 1700. Modification by appellate court.
- 1701. Effect of appeal on power of inferior court.
- 1701 *a*. Effect of doing act pending appeal; act authorized by legislature pending appeal.

§ 1693. The right of appeal from an order of a court of original jurisdiction, granting or refusing an interlocutory injunction, has given rise to much apparent conflict of authority. Such conflict is, however, largely due to the difference in legislation prevailing in the different states touching the right of appeal in general, and the nature or character of the order from which an appeal will lie. Independent of legislation, and upon principle as well as authority, it is believed that the true doctrine is, that an order either granting or refusing a preliminary injunction, being merely an interlocutory order, made during the progress of the cause, does not partake of the nature of a final judgment or decree to such an extent as to warrant an appeal therefrom, or to justify a court of review in revising the

action of the inferior court upon such question.<sup>1</sup> Even in those states where a different rule prevails, as the result of legislation, courts of appellate powers, as will hereafter be shown, have been exceedingly jealous of any interference with the action of the court below. And since an order granting a preliminary injunction is interlocutory in its nature, and not subject to review upon appeal, an appellate court will not, upon appeal from a final decree in the main cause, revise or consider the action of the court below in imposing terms as a condition to granting an interlocutory injunction.<sup>2</sup> But a decree which gives to plaintiff the principal relief sought by his bill and which perpetually enjoins defendants from doing the act in question is a final decree from which an appeal will lie.<sup>3</sup>

§ 1694. In determining, however, whether an appeal will lie from an order granting or continuing an interlocutory injunction, the question must ultimately be controlled by the legislation of the particular state, rather than by any general principle. Thus, under a former statute in New York, which enacted that all persons aggrieved by any sentence, judgment, decree or order of the court of chancery might appeal from the same, or any part thereof, an order continuing an injunction after answer, with costs for resisting a motion to dissolve, was held to fall within the terms of the statute and an appeal was sustained from such order.<sup>4</sup>

<sup>1</sup> *Marble v. Bonhotel*, 35 Ill., 240; *Hobart v. Ford*, 6 Nev., 77; *Miller v. O'Bryan*, 36 Ark., 200. And see *Hilbish v. Catherman*, 60 Pa. St., 444; *Glass v. Clark*, 41 Ga., 544; *Wells v. Coleman*, 53 Cal., 416; *Raymond v. Conger*, 51 Tex., 536; *Northern Pacific R. Co. v. Wells, Fargo & Co.*, 2 Wash., 303.

<sup>2</sup> *Hanford v. Blessing*, 80 Ill., 188.

<sup>3</sup> *Smith v. Walker*, 57 Mich., 456; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 61 Mich., 9.

<sup>4</sup> *McVickar v. Wolcott*, 4 Johns.,

510. The following observations of Spencer, J., embody the reasons for sustaining the right of appeal in such a case: "This appeal is from an order of the court of chancery, continuing an injunction after answer, and directing the payment of costs by the appellants to the respondents for resisting the motion to dissolve the injunction issued on filing the bill. It has been objected preliminarily that no appeal is maintainable upon an order like the present. The twenty-second

But the doctrine in New York now is that the granting, continuing or dissolving a temporary injunction rests in the discretion of the court to which the application is made, and the exercise of such discretion will not be disturbed, unless it clearly appears from the bill or complaint that the plaintiff is not, in any view of the case, entitled to a final injunction.<sup>1</sup> And in New Jersey it is held that all orders granting, refusing, sustaining or dissolving injunctions are appealable, unless in exceptional cases where an order is so temporary in its operation, or so slightly affects the interest of the party on whom it operates, that he can not be said to be aggrieved.<sup>2</sup> So under the present code of Iowa it would seem that an appeal lies from an order either granting or refusing an interlocutory injunction.<sup>3</sup>

article of the constitution and the eighth section of the act regulating proceedings on appeal and error have been cited. The constitution does not profess to specify any regulations upon the subject, but directs that a court shall be instituted for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature. The section of the statute referred to declares that all persons aggrieved by any sentence, judgment, decree or order of the court of chancery or court of probate may appeal from the same, or any part thereof, to this court. The decision of the chancellor, in denying a dissolution of the injunction, directing it to be retained, and awarding costs against the appellants, brings this case within the terms of the statute. An order of that court has intervened, in relation to which the appellants are aggrieved by the payment of costs, if that order is not justified on legal principles. That orders may be appealed from,

it is now too late to controvert; the practice of this court, in hearing such appeals in a variety of cases, has given a construction to the statute not to be shaken. Without undertaking to draw the line between such orders as may or may not be appealed from, in my opinion this is an order from which an appeal lies. In coming to a decision on a motion before the court of chancery, there must necessarily have been an examination into the merits of the case, as disclosed by bill and answer, and the appellants have sustained a *gravamen* in the payment of costs." But for the doctrine of the New York courts under later statutes, see *Paul v. Munger*, 47 N. Y., 469; *People v. Schoonmaker*, 50 N. Y., 499.

<sup>1</sup> *McHenry v. Jewett*, 90 N. Y., 58; *Strasser v. Moonelis*, 108 N. Y., 611.

<sup>2</sup> *Morgan v. Rose*, 7 C. E. Green, 583.

<sup>3</sup> *Bennett v. Hetherington*, 41 Iowa, 142. In Delaware, where the right of appeal is given to the su-

§ 1695. In Louisiana it is held that while an appellate court will not interfere by anticipation with the exercise of the judicial discretion of an inferior court upon an application for an injunction, it will yet revise the judgment of such court after it has acted, to determine whether that discretion has been properly exercised.<sup>1</sup> And if the court below refuses to allow an appeal from its order refusing an interlocutory injunction, when such appeal should be granted, it is held that *mandamus* will lie to compel the court to grant an appeal.<sup>2</sup>

§ 1696. It is, however, worthy of note that even in those states where the right of appeal is recognized from an order of a court of original jurisdiction granting or refusing an interlocutory injunction, courts of review or of appellate jurisdiction interfere with extreme reluctance with the action of the inferior court. Treating the power of granting interlocutory injunctions as resting in a sound judicial discretion, the courts of appellate jurisdiction are averse to any interference with the exercise of that discretion. And to such an extent is this aversion manifest, that it may be stated as a general rule prevailing in states where appeals are allowed from orders granting or refusing injunctions *in limine*, that the appellate or revisory tribunal will not interfere with or control the action of the court below in such matters unless it has been guilty of a clear abuse of that discretion; and by abuse of discretion within the mean-

pervisory court "from any interlocutory or final orders or decrees of the chancellor," the somewhat novel doctrine is held that an order for an injunction *pendente lite* can not be appealed from if it be such an order as a court of equity, under its established rules, may properly issue; but that, if the court has gone beyond its established rules and attempted to enjoin something which equity never before enjoined, an appeal may be had from

such interlocutory order. *Tatem v. Gilpin*, 1 Del. Ch., 13. As to the right of appeal from an order granting an interlocutory injunction under the code of procedure of South Carolina, see *Garlington v. Copeland*, 25 S. C., 41.

<sup>1</sup> *Beebe v. Guinault*, 29 La. An., 795.

<sup>2</sup> *State v. Judge of the Superior District Court*, 26 La. An., 550; *Same v. Same*, 28 La. An., 902.

ing of the rule is meant an error in law committed by the court.<sup>1</sup> Unless, therefore, some established rule of law or principle of equity has been violated, the action of the court below will not be interfered with upon such an appeal.<sup>2</sup> Nor will the appellate court upon such an appeal ordinarily revise or control the discretion of the court below upon questions of conflicting evidence when, after hearing such

<sup>1</sup> DeGodey v. Godey, 39 Cal., 157; Patterson v. Board of Supervisors, 50 Cal., 344; City of New Orleans v. Great Southern T. Co., 37 La. An., 571; Pelzer v. Hughes, 27 S. C., 408; Mead v. Anderson, 40 Kan., 203; Moses v. Flewellen, 42 Ga., 386; Bonaud v. Genesi, 42 Ga., 639; McDonald v. Davis, 43 Ga., 356; Cubbidge v. Adams, 42 Ga., 124; Rowland v. Ransome, 43 Ga., 390; Smith v. Magourich, 44 Ga., 163; Thomas v. Stokes, 44 Ga., 631; Jones v. Jones, 58 Ga., 184; Anthony v. Stephens, 46 Ga., 241; Isam v. Hooks, 46 Ga., 309; Davis v. Weaver, 46 Ga., 626; Oberholser v. Greenfield, 47 Ga., 530; Schaefer v. Hunnewell, 47 Ga., 660; Parker v. Green, 49 Ga., 624. See also Gullatt v. Thrasher, 42 Ga., 429; Bridwell v. McNair, 43 Ga., 176; Hill v. Sledge, 51 Ga., 539; Mason v. Kirkpatrick, 77 Ga., 492; Empire Loan & Building Association v. City of Atlanta, 77 Ga., 496; Wilcoxon M. Co. v. Atkinson, 78 Ga., 338; Georgia Slate Co. v. Davitte, 79 Ga., 627. In Bonaud v. Genesi, 42 Ga., 639, McCay, J., says, p. 640: "The granting or refusing injunctions is in the wise discretion of the chancellor. His judgment is not error unless he acts illegally. This court, as we have said in many cases, is not a court of appeals to re-hear ques-

tions of fact and judge of them *de novo*. It is only when the court below acts illegally that this court will reverse the judgment. We desire to say that in the granting and refusing injunctions, until the hearing, the judge of the superior court is clothed by the law with a discretion. If this court undertakes to reverse his judgment simply because we think the burden of the case is, on the facts, against his judgment, we should be ourselves assuming an original jurisdiction not granted to this court. The judges of the superior court should be careful in these matters, examine patiently and cautiously the facts, and act with deliberation and wisdom. We will always assume they have so done, and will not disturb the judgment on the facts, except in a clear case of mistake, misapprehension or error of law." And it is held in California that the refusal of an application for a rule to show cause why an injunction should not be granted is not "an order refusing or granting an injunction" within the meaning of the code of that state, and therefore no appeal will lie from such order. Grant v. Johnston, 45 Cal., 243.

<sup>2</sup> Jones v. Thacher, 48 Ga., 83; Collier v. Sapp, 49 Ga., 93.

evidence, that court has granted or refused a preliminary injunction.<sup>1</sup>

§ 1697. Upon an appeal from an order granting an interlocutory injunction upon a bill duly verified, where such appeal is allowed, the allegations of the bill are to be taken as *prima facie* true.<sup>2</sup> And when an appeal is allowed from an interlocutory order granting an injunction, the appellate court will not review the action of the court below when the affidavits and evidence upon which the injunction was granted are not preserved by the bill of exceptions.<sup>3</sup> So upon a writ of error to reverse the action of an inferior court upon the hearing of a motion for an injunction, the affidavits used upon the motion should be incorporated into the bill of exceptions, and if only attached to or embraced in the record, without identification by the court below, the writ of error may be dismissed.<sup>4</sup>

§ 1698. Where under the practice of the state an appeal is allowed from an order granting an interlocutory injunction and appointing a receiver *pendente lite*, if a *supersedeas* is granted upon the appeal it has the effect of suspending the order.<sup>5</sup> But an appeal from an order granting a preliminary injunction does not have the effect of authorizing the doing of the act or thing enjoined; since if it were allowed such effect, there would be no material advantage in obtaining an injunction in any case, as it would be in the power of the defendant to avoid its effect by appealing.<sup>6</sup> And where, under the practice of the state, an appeal is allowed from an order refusing an interlocutory injunction, such appeal does not operate as a *supersedeas* as against

<sup>1</sup> Carter v. Hallahan, 59 Ga., 67; Nevin v. Printup, Ib., 281; Smith v. McLaren, Ib., 879; Harris v. Western & Atlantic R. Co., 59 Ga., 830; Augusta Ice Co. v. Gray, 60 Ga., 344; Morris v. Barnwell, Ib., 147; Mayor v. Huff, Ib., 221.

<sup>2</sup> Freshwater v. Pittsburg, W. & K. R. Co., 6 West Va., 503.

<sup>3</sup> Turnbull v. Ellis, 35 Ind., 422; Carver v. Carver, 44 Ind., 265.

<sup>4</sup> Taylor v. Cook, 51 Ga., 215.

<sup>5</sup> State v. Johnson, 13 Fla., 33.

<sup>6</sup> State v. Chase, 41 Ind., 356; Green v. Griffin, 95 N. C., 50; Klinck v. Black, 14 S. C., 241.

the act sought to be enjoined; since to give the appeal such effect would be to perpetuate and continue an injunction which was sought but not granted.<sup>1</sup>

§ 1699. The doctrine is now well established that an appeal from a final decree granting a perpetual injunction and the giving of a *supersedeas* bond will not have the effect of nullifying or suspending the decree, so as to permit the doing of the act enjoined pending the appeal.<sup>2</sup> And, in such case, the court which granted the injunction still has power to punish its violation, notwithstanding the appeal.<sup>3</sup> Where injunctions are granted in a state court, which are affirmed on appeal to the supreme court of the state, and a writ of error is then sued out of the Supreme Court of the United States to reverse the judgment of the supreme court of such state, such writ of error, although made a *supersedeas* by giving the necessary bond in accordance with the acts of Congress, does not operate upon the state court in which the injunctions were first granted to stay or supersede its action, its only operation being upon the supreme court of the state. The Supreme Court of the United States will not, therefore, pending such writ of error, control or interfere with the action of the inferior state court concerning the subject-matter of the litigation.<sup>4</sup>

§ 1700. It is held in Georgia that, although the court of appellate jurisdiction may be of opinion that there is no such abuse of discretion shown as to warrant it in reversing an order of the court below granting a preliminary injunction, it may nevertheless modify such injunction when this course seems necessary for better preserving the equities of the parties.<sup>5</sup> But since the question of retaining an in-

<sup>1</sup> *Troupe v. Eade*, 42 Iowa, 552.

<sup>2</sup> *Hovey v. McDonald*, 109 U. S., 150; *Leonard v. Ozark Land Co.*, 115 U. S., 465, affirming *Ozark Land Co. v. Leonard*, 24 Fed. Rep., 658; *Heinlein v. Cross*, 63 Cal., 44. See also *Slaughter House Cases*, 10 Wal., 273; *Central Union T. Co. v.*

*State*, 110 Ind., 203; *State v. Dillon*, 96 Mo., 56. And see 93d rule in equity of United States courts.

<sup>3</sup> *State v. Dillon*, 96 Mo., 56.

<sup>4</sup> *Slaughter House Cases*, 10 Wal., 273.

<sup>5</sup> *Hill v. Sledge*, 51 Ga., 539.

junction by the court below until a final hearing rests in its sound judicial discretion, the appellate tribunal will not interfere with the exercise of that discretion when the lower court has decided to retain the injunction until the hearing, especially when fraud is charged and the evidence is conflicting, even though the appellate court is of opinion that the injunction should be modified.<sup>1</sup>

§ 1701. When a bill for injunction is dismissed upon the hearing and an appeal is taken from the final decree or order of dismissal, pending such appeal in the court of appellate jurisdiction the original court has no power or authority over the cause in the absence of statute, and can not, therefore, grant an injunction in the cause, pending such appeal.<sup>2</sup>

§ 1701 *a*. If under the practice of a state an appeal lies from an order refusing a preliminary injunction, the fact that the thing which it is sought to enjoin may have already been accomplished will not deprive the party aggrieved of his right of appeal, and the appellate tribunal may still, in its discretion, determine the question whether an interlocutory injunction should have been granted.<sup>3</sup> But when an appeal is had from a judgment refusing an injunction, and, pending such appeal, the act which it is sought to enjoin is authorized by an act of legislature, the judgment of the court below will not be disturbed, however erroneous it may have been when rendered.<sup>4</sup>

<sup>1</sup> *Hollis v. Williams*, 43 Ga., 214.

<sup>3</sup> *Terhune v. Midland R. Co.*, 36

<sup>2</sup> *Galloway v. The Mayor*, 3 DeG., J. & S., 59; *Eureka M. Co. v. Richmond M. Co.*, 5 Sawy., 121. But see *Polini v. Gray*, 12 Ch. D., 438.

N. J. Eq., 318.

<sup>4</sup> *Linn County v. Hewitt*, 55 Iowa, 505.



## II. APPEALS FROM THE DISSOLUTION OF INJUNCTIONS.

- § 1702. Conflict of authority; the general doctrine stated.  
 1703. The doctrine in New York.  
 1704. The doctrine in Louisiana.  
 1705. The doctrine in Nebraska and Missouri.  
 1706. The doctrine in Illinois.  
 1707. The doctrine in Iowa.  
 1708. When order affirmed; temporary restraining order.  
 1709. Appeal from dissolution does not revive injunction.  
 1710. Effect of affirming dissolution.  
 1711. Amount of appeal bond on dissolving injunction against judgment.

§ 1702. The same conflict of authority which has already been noted as characterizing the question of the right of appeal from the granting or refusing of an interlocutory injunction is also observable in connection with the right of appeal from an order dissolving or refusing to dissolve such an injunction; and in this case, as in the former, the conflict in question is due to the difference in legislation in the various states touching the right of appeal. In the absence, however, of express or controlling legislation governing the question, the proposition may now be regarded as well settled that the power of dissolving, like that of granting preliminary injunctions, resting in the sound judicial discretion of the court to which the application is addressed, an appeal or writ of error will not ordinarily lie to correct or reverse an order of the court below dissolving or refusing to dissolve an interlocutory injunction.<sup>1</sup> Even in states

<sup>1</sup> *Van Dewater v. Kelsey*, 1 N. Y., 533; *Young v. Grundy*, 6 Cranch, 51; *Buffington v. Harvey*, 5 Otto, 99; *Boinay v. Coats*, 17 Mich., 411; *Spencer v. Stearns*, 28 Mich., 463; *Choteau v. Rice*, 1 Minn., 24; *Pickle v. Holland*, 24 Miss., 566; *Keel v. Bently*, 15 Ill., 228; *Pentecost v. Magahee*, 4 Scam., 326. See also *Cornelius v. Coons*, Breese, 15 (Beecher's Edition, 37). See as to the right of appeal from the dissolution of an injunction in Louisiana, *State v. Judge of 22d Judicial District*, 37 La. An., 118; *Schmidt v. Foucher*, 37 La. An., 174; *State v. Judge Civil District Court*, 37 La. An., 825; *Puckette v. Hicks*, 39 La. An., 901.

where the right of appeal from such orders has been recognized, an appellate court will rarely, if ever, interfere unless the case be free from doubt or some principle of law or equity has been violated, or unless there has been an abuse of discretion on the part of the court below.<sup>1</sup> And under a statute authorizing appeals from final judgments only, an appeal will not lie from an order dissolving an interlocutory injunction and awarding costs and damages thereon.<sup>2</sup>

§ 1703. In New York, while a different doctrine formerly prevailed under the legislation regulating the subject of appeals,<sup>3</sup> under a later statute it is held that, since the right to a preliminary injunction rests in the sound discretion of the court, an order dissolving such injunction does not affect a substantial right as the term is used in the statute giving jurisdiction to the Court of Appeals; an appeal will not, therefore, lie from such order,<sup>4</sup> especially when the injunction is merely incidental to the principal relief sought, and when the merits of the case are not disposed of by such order.<sup>5</sup> And for the same reasons, an order denying a motion to dissolve can not be reviewed on appeal.<sup>6</sup>

<sup>1</sup> *Fleischman v. Young*, 1 Stockt., 620; *Garr v. Hill*, 1 Halst. Ch., 639; *Loyless v. Howell*, 15 Ga., 554; *Robenson v. Ross*, 40 Ga., 375; *Cohen v. Meyers*, 42 Ga., 46; *Clark v. Herring*, 43 Ga., 226; *Hollis v. Williams*, 43 Ga., 214; *Hart v. Mills*, 38 Tex., 513; *Parrott v. Floyd*, 54 Cal., 534; *White v. Nunan*, 60 Cal., 406.

<sup>2</sup> *Tanner v. Irwin*, 1 Mo., 47; *Johnson v. Board of Education*, 65 Mo., 47. In *Tanner v. Irwin*, the reasons for refusing to permit appeals from such orders are very clearly stated in the opinion of the court by M'Girk, C. J., as follows: "If an appeal from an interlocutory decree in chancery were allowed, a cause would scarcely ever end, and would and might be

so carved up that when the chancellor would be ready to pronounce a final decree, the fragments of the cause would be to collect, and the proceedings would be involved in endless perplexity. We are clearly of opinion the appeal is premature, and if injury has been done the chancellor will rectify it on the final hearing."

<sup>3</sup> See *McVickar v. Wolcott*, 4 Johns., 510.

<sup>4</sup> *People v. Schoonmaker*, 50 N. Y., 499.

<sup>5</sup> *Paul v. Munger*, 47 N. Y., 469.

<sup>6</sup> *Pfohl v. Samson*, 59 N. Y., 174; *Brown v. Keeney Association*, 59 N. Y., 242; *Calkin v. Manhattan Oil Co.*, 65 N. C., 557. As to the right of appeal from an order refusing to dissolve an interlocutory injunc-

§ 1704. It is held in Louisiana, that an order overruling a motion to dissolve a preliminary injunction is an interlocutory order from which an appeal will not, ordinarily, lie.<sup>1</sup> If, however, the order of dissolution is of such a nature as to work an irreparable injury to the plaintiff, an appeal may be allowed.<sup>2</sup> And it has even been held that the court below may be compelled by *mandamus* to allow such appeal.<sup>3</sup>

§ 1705. It is held in Nebraska, that in determining whether an appeal or writ of error will lie to reverse the judgment of a lower court dissolving an interlocutory injunction, the controlling point is whether the order affects a substantial right and determines the action, so that nothing further is required to dispose of the cause. And when this is not the case, and the substantial rights of the parties are not yet determined, notwithstanding the dissolution, the order is not appealable.<sup>4</sup> But an order dissolving an injunction and dismissing the bill is a final order from which an appeal will lie.<sup>5</sup>

§ 1706. In Illinois the doctrine is well established that in cases where an injunction is the only relief sought by the bill, and a motion to dissolve for want of equity in the bill is sustained by the court, the order of dissolution is such a final order as entitles the plaintiff to a writ of error or an appeal therefrom. In such cases, the motion to dissolve operates as a demurrer to the bill for want of equity, and is considered as an admission of the material allegations of the bill. The decree, therefore, dissolving the injunction, is a complete denial of the equity of the bill and of the relief sought, and the bill may be at once dismissed,

tion, under the code of Virginia, see *Kahn v. Kerngood*, 80 Va., 342.

<sup>1</sup> *Woolfolk v. Woolfolk*, 22 La. An., 206.

<sup>2</sup> *State v. Judge of Fourth District Court*, 23 La. An., 151; *State v. City of New Orleans*, 26 La. An., 304.

<sup>3</sup> *State v. Judge of Fourth District Court*, 23 La. An., 151.

<sup>4</sup> *Smith v. Sahler*, 1 Neb., 310; *Scofield v. State National Bank*, 8 Neb., 16.

<sup>5</sup> *Oberkoetter v. Luebbering*, 4 Mo. App., 481.

and the action of the court reviewed on error or appeal.<sup>1</sup> And the same rule is applied when the injunction is the only relief sought and the motion to dissolve is heard upon bill, answer and affidavits; and in such case the dissolution of the injunction may be treated as a final disposition of the cause, from which an appeal will at once lie.<sup>2</sup>

§ 1707. In Iowa a distinction has been drawn between cases where a dissolution of the injunction affects the merits of the cause, involving a decision upon material questions in controversy, and cases where the dissolution does not go to the merits, but affects simply collateral matters, or questions purely within the discretion of the court, the right of appeal being recognized in the former class of cases, but denied in the latter.<sup>3</sup> And it is held that, while the dissolution, like the granting of an interlocutory injunction, rests in the sound discretion of the court, yet this is a legal discretion, and if abused or exercised upon insufficient grounds, the action of the court may be reversed by the appellate tribunal.<sup>4</sup>

§ 1708. When, under the statutes of a state, an appeal lies from an order dissolving an injunction, an order which modifies an injunction and suspends its operation in part is held to be, in effect, an order of dissolution *pro tanto* and hence appealable.<sup>5</sup> But although under the practice of the state an appeal lies from an order vacating a preliminary injunction, such an order will not be reversed on appeal unless, by a clear preponderance of evidence, it is apparent that the court below abused its discretion; and if the reasons for and against the injunction are very nearly balanced, the order will be affirmed.<sup>6</sup> And where by statute an appeal lies from an order granting, or dissolving, or re-

<sup>1</sup> *Titus v. Mabey*, 25 Ill., 257; *Shaw v. Hill*, 67 Ill., 455; *Weaver v. Poyer*, 70 Ill., 567. See also *Gardt v. Brown*, 113 Ill., 475.

<sup>2</sup> *Prout v. Lomer*, 79 Ill., 331.

<sup>3</sup> *Trustees v. Davenport*, 7 Iowa, 213.

<sup>4</sup> *Sinnet v. Moles*, 38 Iowa, 25.

<sup>5</sup> *Weaver v. Mississippi & R. R. Co.*, 30 Minn., 477.

<sup>6</sup> *Wood v. Millsbaugh*, 15 Kan., 14.

fusing to dissolve an injunction, a distinction is taken between an injunction proper and a temporary restraining order, the latter being limited in its extent and operation to such reasonable time as may be necessary to notify the opposite party; and from an order dissolving such temporary restraining order no appeal will lie.<sup>1</sup>

§ 1709. Upon the question whether an appeal from a decree dissolving an injunction has the effect of continuing the injunction pending the appeal, the authorities are by no means uniform, the want of harmony, however, being in part due to conflicting statute regulations or rules of practice in the various states. The better considered doctrine clearly is that such appeal does not have the effect of reviving or continuing the injunction, since the process of the court, when once discharged, can only be revived by a new exercise of judicial power. An appeal being merely the act of the party, can not, of itself, affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer exists. It follows, therefore, that an appeal from a decree dissolving an injunction can not have the effect of reviving the injunction and of continuing in force by the mere act of the party appealing a judicial order which has been set aside.<sup>2</sup> The question is, however, so largely dependent

<sup>1</sup> *Pleasants v. Vevay Company*, 42 Ind., 391.

<sup>2</sup> *Garrow v. Carpenter*, 4 Stew. & P., 336; *Chegary v. Scofield*, 1 Halst. Ch., 525; *Hoyt v. Gelston*, 13 Johns., 139; *Wood v. Dwight*, 7 Johns. Ch., 295; *Hovey v. McDonald*, 109 U. S., 150; *Payne v. McCabe*, 37 Ark., 318. And see *Slaughter House Cases*, 10 Wal., 273; *Park v. Meek*, 1 Lea, 78. But see, *contra*, *Penrice v. Wallis*, 37 Miss., 172; *Yocum v. Moore*, 4 Bibb, 221; *Turner v. Scott*, 5 Rand., 332; *Williams v. Pouns*, 48 Tex., 141; *Balkum v. Harper's Adm'rs*,

50 Ala., 372; *Smith v. Western Union T. Co.*, 83 Ky., 269; *State v. Judge Sixth District Court*, 32 La. An., 1276; *State v. Judge 19th Judicial District Court*, 33 La. An., 133; *State v. Judge 22nd Judicial District Court*, 33 La. An., 760; *State v. Houston*, 37 La. An., 852; *State v. Judge 12th District Court*, 38 La. An., 31; *Gulf, C. & S. F. R. Co. v. Fort Worth & N. O. R. Co.*, 68 Tex., 98. But see *Fort Worth S. R. Co. v. Rosedale S. R. Co.*, 68 Tex., 163. In *Hoyt v. Gelston*, 13 Johns., 139, it is said, *per curiam*: "In this case the injunction had

upon and governed by legislation or by local rules of practice that its ultimate determination in any state must ordinarily be governed by the rules of practice prevailing in that state.<sup>1</sup>

been dissolved, from which order there was an appeal; and it is now urged that this appeal suspends all proceedings in this court, as much as if the injunction was still in full force. To give such effect to an appeal from an order dissolving an injunction would be very mischievous in practice, and serve as a great engine of delay. We must consider the case now in this court as if no injunction had ever issued. If the parties have committed any contempt by proceeding, application must be made to the court of chancery to punish such contempt, but that is a matter with which this court has no concern. It is enough for us that there is no existing injunction. Suppose application had been made in the first instance to the chancellor and he had refused the injunction, an appeal would have lain from such refusal; but such appeal would not tie up the proceedings at law. If an appeal was to have such an operation, applications for injunctions might be perverted to the worst of purposes." And in *Wood v. Dwight*, 7 Johns. Ch., 295, Kent, Chancellor, observes that, "if the order dissolving an injunction, or discharging a party from a writ of *ne exeat* was duly entered, no subsequent appeal by the dissatisfied party could, of itself, affect the validity of the order, or revive the process and give it force and effect. An appeal only stays future proceedings in the court; but here is

no further proceeding. The order is perfect and finished *eo instanti* that it is entered; and if the injunction could be revived by the mere act of the party in filing an appeal, it would be giving to him not only a power of control over the orders of the court, but of creating an injunction. The Supreme Court of this state in *Hoyt v. Gelston* (13 Johns. Rep., 139), held that an injunction was not revived by an appeal, so as to operate as a stay of proceedings at law; and the Supreme Court of the United States, in *Young v. Grundy*, 6 Cranch, 51, held that no appeal would even lie upon an interlocutory order dissolving an injunction. Whether an appeal can be sustained, is a question for the Court of Errors; but supposing it can be sustained, it is impossible that a process that is duly discharged, and *functus officio*, can be revived by the mere act of the party. How could this court undertake to enforce the process and punish contempts of it in the very face of the order dissolving it? When a process is once discharged and dead, it is gone forever; and it never can be revived but by a new exercise of judicial power. It is sufficient, in this case, to declare that the defendant is entitled to pursue his remedy at law, equally as if no injunction had issued; and no special leave to proceed is requisite."

<sup>1</sup>The 93rd of the Equity rules of the United States courts provide

§ 1710. When an appeal is taken from an order dissolving a temporary injunction and the judgment of the court below is affirmed, such proceedings do not have the effect of terminating the action, since upon the final hearing the plaintiff may still show that he is entitled to a perpetual injunction. It is, therefore, error to dismiss the action in the

as follows: "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party." As to the considerations governing the circuit courts of the United States in continuing an injunction in force, pending an appeal, under this rule, see *Reynolds v. Iron S. M. Co.*, 33 Fed. Rep., 354.

In Louisiana it is held that after an execution is enjoined and a suspensive appeal taken from the judgment dissolving such injunction, the court below has no power pending the appeal to order the sale of any portion of the property seized under execution, and that the injunction bond stands as a protection to plaintiff in the execution; and a writ of prohibition has been allowed, in such case, to prevent the court below from selling under the execution pending the appeal. *State v. Judge of Fifth District Court*, 25 La. An., 666.

Under the code of procedure in New York, when a temporary injunction is granted, but the bill is

dismissed upon the hearing, the court can not, pending an appeal from its judgment, grant an injunction in the same action in behalf of plaintiff and appellant for the same purpose sought by the original bill, and can not revive the original injunction pending such appeal. *Fellows v. Heermans*, 13 Ab. Pr. N. S., 1; *Spears v. Mathews*, 66 N. Y., 127. See, *contra*, *Spears v. Mathews*, 6 Hun, 489.

In New Jersey it would seem that, pending an appeal from a decree dissolving an injunction, the appellate court may grant a temporary injunction staying the proceedings to restrain which the original injunction was sought. *Chegary v. Scofield*, 1 Halst. Ch., 525; *Doughty v. Somerville & Easton R. Co.*, 3 Halst. Ch., 629.

In Alabama, under a rule of court making it the duty of the chancellor upon dissolving an injunction to prescribe the penalty and condition of the bond to be given upon appeal, the execution of such bond operating under the rule to restore the injunction until reviewed by the Supreme Court, it is held that the duty thus imposed upon the chancellor is so plain and imperative as to leave no room for discretion on his part, and that *mandamus* will lie to compel performance of such duty. *Ex parte Planters & Merchants Mutual Insurance Co.*, 50 Ala., 390.

court below, upon the ground that the matter has been disposed of, and plaintiff is still entitled to a final hearing.<sup>1</sup>

§ 1711. Upon an appeal from the dissolution of an injunction against a judgment at law, it is held that the amount of the appeal bond should be determined with reference to the amount of the judgment for damages upon the dissolution, and not with reference to the amount of the original judgment which was enjoined.<sup>2</sup>

<sup>1</sup> *Rayle v. Indianapolis, P. & C. R. Co.*, 40 Ind., 347.

<sup>2</sup> *Malain v. Judge of Third Judicial District*, 29 La. An., 793.



# INDEX.

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THE REFERENCES ARE TO THE SECTIONS.

## A.

**ABATEMENT.** (See **NUISANCE.**)

**ACCIDENT,**

ground for enjoining actions at law, 47.

judgments, 209.

distinction between, and carelessness, 210.

loss of conveyance, when ground for enjoining sale, 327.

**ACCOMMODATION PAPER,**

maker of, can not enjoin collection, 1181.

**ACCOUNT,**

complicated, when ground for enjoining foreclosure, 448.

may be decreed when waste enjoined, 669, 671.

when decreed without injunction, 670.

granted when stone quarried in excess of rights, 709.

may be required pending trial of right at law, 921.

not incident to injunction in patent case, 987.

incidental to injunction in copyright case, 1021.

decreed where trade marks infringed, 1084.

allowance by corporation of improper, not enjoined, 1222.

dissolution and, receiver not of course, 1352.

decree for, against executor, judgment for all creditors, 1364.

will suit on official bond be enjoined until taken, 1386, n.

English and Irish practice after a decree for, of assets of deceased debtor, 1408, 1409.

when right doubtful, injunction dissolved when kept, 1498.

**ACQUIESCENCE** (see **LACHES**),

bars relief by injunction, 10.

against railroad company, 618, 643.

trespass to mines, 731.

nuisances, 756.

to water, 797.

against erection of bridge, 837.

as against the public, 837.

easement, 849.

(1283)

THE REFERENCES ARE TO THE SECTIONS.

ACQUIESCENCE — *Continued.*

- in use of water a bar to relief, 871, 884, 885.
- in construction of bridge a bar, 926.
- of public in patent, presumption of novelty, 941.
- of patentee, a bar, 965, 966.
- and laches in copyright cases, 1028, 1029, 1030, 1031.
  - publication of musical composition, 1056.
- a bar to injunction against pirated trade mark, 1068.
  - further discussion of doctrine, 1100, 1101.
  - in violation of covenants relating to real property, effect of, 1159.
- in removal from office in corporation, 1194.
- in building of smaller portion of railroad than contemplated, 1205.
- by shareholder a bar to relief, 1206.
  - in act *ultra vires*, 1229.
- in construction of public work, 1260.
  - highway, 1278.
- by municipality in injunction against performance of its duty, 1306.
- in breach of injunction, must create new right in defendant, 1450.
- and laches a bar to a dissolution, 1480.
- in acts of fraud affecting realty, 1512.

ACTIONS AT LAW,

- in criminal matters, not enjoined, 20, 63.
- injunctions against, 45-111.
  - grounds of the jurisdiction, 45-88.
    - courts not enjoined, but parties, 45.
    - judge not enjoined, 46.
    - fraud, accident and mistake, 47.
    - undue influence, 47.
    - when injunction dissolved, 47.
    - removal of cause enjoined, 48.
  - actions enjoined when equity has acquired jurisdiction, 49.
    - allowed on motion, 49, 55.
  - court of law first acquiring jurisdiction, injunction denied, 50, 51.
    - probate court, court martial, 50.
    - court of admiralty, 50.
    - proceedings in equity not enjoined, 52.
    - exception, in action of interpleader, 53.

THE REFERENCES ARE TO THE SECTIONS.

**ACTIONS AT LAW — *Continued.***

- from execution of process of equity, when enjoined, 54.
- requisites of bill to enjoin, 56.
- of the parties to, 57.
- when application made in suit pending, 58.
- confessing judgment as a condition to enjoining, 59, 60.
- enjoined on bill of peace, 61.
  - to prevent multiplicity of suits, 61.
  - distinction between multiplicity and consolidating suits, 62.
  - actions to recover penalties enjoined for multiplicity, 63.
  - weekly actions for wages enjoined, 63.
  - upon notes, enjoined, 63.
- fears of, no ground of relief, 64.
- injunction not granted to prevent injunction, 64.
- not enjoined because of unconstitutional law, 64.
- test as to enjoining multiplicity of, 65.
- upon notes, enjoined for failure or want of consideration, 66, 67.
- for *mandamus*, not enjoined, 68.
- on fraudulent foreign judgment, enjoined, 69.
- upon unconscionable bargains with heirs, enjoined, 70.
- upon gaming contract, enjoined, 70.
- on bonds to recover penalty, formerly enjoined, 71.
  - for purchase of office, enjoined, 71.
- solicitor enjoined from acting adversely, 72.
- against receivers, when enjoined, 73.
- different suits in behalf of infants, one enjoined, 74.
- between landlord and tenant, 75.
- upon usurious contracts, injunctions against, 76.
- in attachment, injunctions affecting, 77.
- upon awards, when enjoined, 78.
- when change of venue allowed, 79.
- absence of witnesses, 79.
- pleading statute of limitations, 79.
- bond for purchase of personal property, suit not enjoined, 80.
- proceedings under United States revenue laws not enjoined, 81.
- on ground of trust, execution only enjoined, 82.
- upon note, insolvency of maker, 82.
- injunction against, effect on special bail, 83.
  - on trial, 83.
  - trial not compelled by *mandamus*, 83.
- to collect debt, not enjoined because of security, 84.
- to recover damages for fraudulent proceedings in chancery, 84.
- against person of debtor, enjoined when imprisonment for debt abolished, 84.

## THE REFERENCES ARE TO THE SECTIONS.

ACTIONS AT LAW — *Continued.*

- dismissal of, enjoined, 85.
- lost agreement, 85.
- injunction against garnishees, 86.
- injunctions against, effect on statute of limitations, 87.
- dissolution of injunction to, error for court of equity to give judgment, 88.
- defense at law, 89-94.
  - bars relief by injunction, 89.
  - want of jurisdiction, 89.
  - no title in forcible detainer, 89.
  - payment on note not credited, 89.
  - exclusion of evidence, 89.
  - illegality apparent in instrument, 89.
  - frivolous action not enjoined, 90.
  - fraudulent life insurance policy, 90.
  - proceedings in garnishment, 90.
  - violations of ordinance, 90.
  - proceedings for *mandamus*, 90.
  - repetition of actions, 90.
  - statutory relief, 90.
  - concurrent jurisdiction of equity, 91.
  - action on foreign judgment, 91.
  - suits on insurance policy, 91.
  - cases of set-off, 92.
  - rule applied regardless of merits, 93.
  - fears as to obtaining justice, 93.
  - exceptions to rule, 94.
  - suit on administrator's bond, 94.
- suits pertaining to real property, 95-102.
  - ejectment, when enjoined, 95-97.
  - forcible entry and detainer, 98.
  - upon bond for conveyance where vendor has no title, 99.
  - foreclosure when mortgage paid, 99.
  - contest between heirs and devisee under lost will, 100.
  - confusion of boundaries, 100.
  - when bill to establish title not entertained, 101.
  - proceedings by lessor for recovery, 101.
  - title pending in equity, party enjoined from recovery before justice, 102.
- suits in foreign courts, 103-107.
  - English doctrine as to enjoining, 103, 104.
  - Irish doctrine as to enjoining, 104.

THE REFERENCES ARE TO THE SECTIONS.

# ACTIONS AT LAW — *Continued.*

- property in foreign country no bar to relief, 105.
- foreign foreclosure, when enjoined, 105.
- relative convenience considered, 105.
- American doctrine, 106.
- attachment in other state enjoined, 106.
- when not enjoined, 107.
- as between state and federal courts, 108–111.
  - on principle, injunctions should be allowed, 108.
  - federal courts can not enjoin actions in state courts except in aid of bankruptcy, 109.
  - otherwise when federal court first has jurisdiction, 110.
  - interference by state courts with actions in United States courts, 111.
- as affected by proceedings in bankruptcy, 282–303.
- against United States marshal, when not enjoined, 298.
- against bankrupt, enjoined pending composition, 299.
- pending, obstruction to right of way enjoined when injury irreparable, 887.
- when doubtful whether it would lie, in copyright cases, relief refused, 1033.
- injunction granted, conditioned upon, 1037, 1055.
- required when originality of musical composition doubtful, 1055.
- on contract, when against conscience, enjoined, 1110.
- necessary when business resumed in employ of third person, 1176.
- payment of *de facto* officer's salary not enjoined pending, 1314.
- brought by one partner against another, enjoined, 1338.
- ignorance by surety of defense, without diligence, no ground for relief, 1383.
- what constitutes violation of injunctions against, 1434.
- dissolution of injunctions against, 1536–1541.
- party in, who has no interest, not entitled to relief, 1547.
- one not a party enjoined from, when equity has full possession of cause, 1548.
- one not a party can not enjoin, 1550.
- bill instituted at the instigation of another person, 1550.
- damages to real party when nominal party enjoined, 1682.

# ADMINISTRATION,

- taking out letters of, not enjoined, 51.

## THE REFERENCES ARE TO THE SECTIONS.

## ADMINISTRATORS AND EXECUTORS,

- not enjoined on general charges, 25.
- bond of administrator, when suit on enjoined, 94.
- judgment against, when enjoined, 144.
- administrator, when denied injunction against sale, 380.
  - when enjoined from selling, 381.
  - not restrained from waste because surety insolvent, 665.
  - may enjoin collection of note delivered after death, 1132.
  - may wind up firm, 1356.
- jurisdiction usually exercised for protection of estate, 1360.
  - relief in behalf of next of kin, 1360.
  - when sales enjoined, 1360.
- improper distribution enjoined, 1361.
- suit to recover funds enjoined when danger of waste, 1361.
- insolvency not sufficient to restrain sale, 1361.
- defective execution of power relieved against, 1362.
  - omission of one administrator, 1362.
  - ejectment by heirs enjoined, 1362.
- judgment against, enjoined when set-offs discovered, 1363.
  - no assets; *sci. fa.*, 1363.
  - for personal liability not enjoined, 1364.
- court will protect its own decrees, 1364.
  - accounting, rights of creditors under, 1364.
- administration of estates, original jurisdiction of, 1365.
  - execution *de bonis propriis* enjoined, 1365.
  - neglect in collection of assets, 1365.
- fraud, 1366.
  - satisfaction of fraudulent claims enjoined, 1366.
  - judgment by default on stale claim, 1366.
  - sale by insolvent executor under fraudulent chattel mortgage, 1366.
- heirs at law entitled to relief, 1367.
  - where sale unnecessary, 1367.
  - grantee of, when personal property sufficient, 1367.
  - where property claimed by; in trust, by gift, 1367.
- jurisdiction not favored, 1368.
- protection pending contest over right to administer, 1368.
- judgment against testator not enjoined, 1369.
- agreement not to enforce against executor personally, not enforced on motion, 1369.
- where consideration of note has failed, 1369.
- when judgment against legatee enjoined, 1370.

## THE REFERENCES ARE TO THE SECTIONS.

ADMINISTRATORS AND EXECUTORS — *Continued.*

- second sale by administrator *de bonis non* enjoined, 1371.
- injunction refused when other relief available, 1372.
- obtaining judgment by creditor against, 1372.
- injunction against sale under power no bar to executor's sale, 1373.
- sale of legacies under execution against legatee enjoined, 1374.
- waste by, no ground for enjoining judgment for contribution by one surety of, against another, 1385.
- husband as, can not enjoin sale of wife's property under trust deed, 1392.
- English and Irish practice after decree for account of assets of deceased debtor, 1408, 1409.
- denial of bill by, on information and belief, 1507, 1535.
- practice on death of complainant, 1609.
  - defendant, 1610.
  - nominal parties, 1610.

## ADMIRALTY COURT,

- when proceedings enjoined, 50.

## ADVERSE USER,

- no bar to relief against public nuisances, 771.

## AFFIDAVITS,

- of insolvency of bank, what necessary, 1189.
- contempt usually proved by, 1452.
- of person having knowledge necessary, when bill on information, 1567.
- verification of, nature and requisites, 1569.
- of information, in an information, necessary, 1570.
- error to grant perpetual injunction on, 1576.
- admission of, in support of motion, 1576.
  - opposition, 1577.
- effect of answer as, 1574, 1577, 1587, 1604.
- causes requiring, and amendment should be verified by, 1592.
- admission of, on motion to dissolve, 1603.
  - in support of answer, 1604.
  - new matter in, 1607.
  - before or after answer, 1607.
  - neglect to sign jurat, 1614.
- objections to, must be taken in court below, 1614.
- should be preserved in bill of exceptions on appeal, 1697.

## AGENTS,

- enjoined from disclosing secrets, 19.
- proceeding against, barred by action against principal in England, 1065.

## THE REFERENCES ARE TO THE SECTIONS.

**AGENTS** — *Continued.*

- owner and agent, can not join to enjoin infringement of trade mark, 1102.
- contract to employ one as, not enforced, 1112.
- transfer of real estate of, when principal's money not identified with, 1415.
- with knowledge of injunction liable for a violation, 1435.
  - without knowledge, 1440.
- tenants not, 1440.
- principal can enjoin judgment fraudulently recovered against, 1552.
- principal allowed relief against, 1559.
  - sale of chattels; stock, 1559.
  - money deposited to agent's account, 1559, *n.*
- of foreign government not enjoined, 1562.
- with knowledge, may verify bill, 1567.
  - of corporation, 1568.

**ALIENS,**

- infringing patent enjoined, 985.
- entitled to protect trade mark, 1102.
  - enjoin illegal aid-bonds, 1287.

**ALIMONY,**

- injunction pending proceedings for, 1393.
  - error to perpetually enjoin sale to secure, 1395.
  - should be made a lien and injunction dissolved, 1396.

**AMENDMENTS,**

- when permitted, 41.
- prayer for injunction may be inserted by, 1573.
- practice as to, 1592-1598.

**ANSWER** (see DISSOLUTION; PRACTICE),

- injunctions before, in waste, 668.
- information may call for, under oath, 1570.
- effect of on motion for injunction, 1574, 1577, 1587, 1604.
- affidavit can not contradict, on title, 1576, 1603.
- rule of court requiring notice after, may be dispensed with, 1580.
- amendment after, not favored, 1592.
  - Irish practice, 1597.

**APPEAL,**

- execution pending, when enjoined, 154.
- remedy by, bars injunction against judgment, 173.
  - exception to rule, 174.
  - bars injunction against opening streets and highways, 579.



## THE REFERENCES ARE TO THE SECTIONS.

APPEAL—*Continued.*

- when pendency of vacates assessment, injunction allowed during, 583.
- will not lie from injunction and reference in patent case, 982.
- proper remedy to test legality of ordinances, 1244.
- denial of, by municipality, ground for relief, 1266.
- does not revive injunction, 1431, 1536.
- effect of violation pending stay order, 1431, n.
- does not lie from order adjudging one guilty of contempt in Wisconsin, 1466.
- lies from decree of dissolution on an injunction bill, 1477.
- by principal in injunction bond, alone, validity not considered, 1633.
- liability of sureties on an injunction bond, 1636.
- right to, by sureties in injunction bond, 1647.
- damages accruing pending, not allowed in suit on bond, 1665.
- discretion of court in awarding damages not reviewed on, 1684.
- from granting of injunctions, 1693-1701.
  - not usually allowed independent of statute, 1693.
  - from final decree, terms imposed on granting writ not considered, 1693.
  - question dependent upon statute, 1694.
  - right exists in New Jersey and Iowa, 1694.
  - Louisiana rule, 1695.
    - discretion of court after issuance of writ reviewed, 1695.
    - mandamus* will lie to compel granting of, 1695.
  - appellate courts averse to interfering with action of court below, 1696.
  - abuse of discretion means error of law, 1696.
  - when evidence conflicting, 1696.
  - bill duly verified taken as true, 1697.
  - affidavits should be preserved on, 1697.
  - effect of, on act enjoined, 1698.
  - effect of writ of error from United States Supreme Court, 1699.
    - on inferior state court, 1699.
- doctrine in Georgia, 1700.
  - appellate court may modify, 1700.
    - will not interfere with retention of writ by lower court, 1700.

THE REFERENCES ARE TO THE SECTIONS.

**APPEAL** — *Continued.*

effect of, on power of inferior court, 1701.

doing act pending, 1701 *a*.

act legalized pending, 1701 *a*.

**from the** dissolution of injunctions, 1702-1711.

not allowed independent of statute, 1702.

abuse of discretion must exist, 1702.

order of dissolution not a final decree, 1702.

New York doctrine, 1703.

does not lie from order dissolving or denying motion, 1703.

**rule in** Louisiana, 1704.

not ordinarily allowed, 1704.

when order works irreparable injury, 1704.

*mandamus* lies to compel granting of, 1704.

Nebraska rule, 1705.

**in** Missouri, order of dissolution and dismissal appealable, 1705.

**the doctrine in** Illinois, 1706.

when injunction the only relief sought, 1706.

motion operates as a demurrer, 1706.

bill may be at once dismissed, 1706.

**when** motion heard on bill, answer and affidavits, 1706.

**the rule in** Iowa, 1707.

**test whether** injunction main relief sought, 1707.

abuse of discretion, 1707.

**when** order affirmed, 1708.

temporary restraining order, 1708.

does not revive injunction, 1709.

**plaintiff may** enforce his execution, notwithstanding, 1709.

**when** order affirmed, plaintiff entitled to a final hearing in court below, 1710.

**injunction against** judgment, amount of appeal bond, 1711.

**ARBITRATORS.** (See **AWARDS.**)

**ARRESTS,**

under ordinance, not enjoined, 1244.

by humane society, 1244.

**ASSESSMENT.** (See **TAXES.**)

**ASSESSORS.** (See **TAXES.**)

**ASSIGNEE,**

of copyright protected, 1057.

**when** publisher treated as, 1059.

THE REFERENCES ARE TO THE SECTIONS.

**ASSIGNEE** — *Continued.*

- rights of, when contract between author and publisher personal, 1061.
- of trade mark protected, 1072, 1103.
- of mineral springs protected, 1082.
- of contract protected, 1113.
  - assignor, enjoined from interfering, 1113.
- of realty, bound by covenants, 1154.
- of security given on dissolution of partnership, when enjoined from enforcing, 1183.
- bound by acquiescence of vendor of shares, 1206.
- for benefit of creditors, rights of, when no fraud shown, 1411.
- may proceed when injunction against assignor not dissolved, 1436.

**ASSIGNEE IN BANKRUPTCY.** (See **BANKRUPTCY**.)

**ASSIGNMENT,**

- for creditors, as affecting sale of debtor's property, 264.
  - when enjoined by assignee in bankruptcy, 291.
- of note pending injunction, not void, 1133.
- for creditors, rights of creditors who have not accepted and of assignee when no fraud shown, 1411.

**ATTACHMENT** (see **VIOLATION**),

- actions of, injunctions concerning, 77.
  - in other state, when enjoined, 106.
- creditor under, when entitled to enjoin waste, 658.
  - rights of, in transfers of debtor's property, 1405.
- when debtor non-resident, ground for relief in equity to contract creditor, 1406.
- fraudulent; partial delivery, under agreement, to creditor who sold supplies, 1406.

**ATTORNEYS,**

- enjoined from disclosing secrets, 19.
  - acting in adverse capacity, 72.
- fraud by, ground for enjoining judgment, 202.
- absence or misconduct of, no ground for enjoining judgment, 210.
- mistake of, no ground for enjoining judgment, 216, 221.
- ignorance or negligence of, no ground for relief, 221.
- contracts not to practice, 1168, 1175.
- illegal payment of fees to, by municipality, enjoined, 1238.
- employment of additional, by city, not enjoined, 1267.
- advice of, no defense to violation of injunction, 1420.
- duty of, when clients enjoined, 1426.
- defendant can not proceed, when attorney enjoined, 1440.

## THE REFERENCES ARE TO THE SECTIONS.

ATTORNEYS — *Continued.*

- when served with writ pending application for a receiver, 1441.
- bringing suit in United States courts when enjoined in state courts, 1441.
- advice of, mitigates violation of injunction, 1457.
- in suit at law, may verify creditor's bill, 1567.
- of corporation, may verify bill, 1568.
- with knowledge, affidavit of verification, nature and requisites of, 1569.
- fees of, recovered as damages for restraining sale under foreclosure, 1671.
- counsel fees on dissolution, 1685-1692.

## ATTORNEY-GENERAL,

- may enjoin erection of piers in harbor, 760.
- proceedings by, no bar to relief to citizens, 762.
  - when act prohibited, injury need not be shown, 764.
- can not enjoin use of floating elevator, 765.
- may enjoin obstruction of navigable river, 766.
- can not interfere with directorship of railway, 1199.
- on relation of private citizen, may enjoin act *ultra vires*, 1224.
- can not enjoin organization of municipality, 1261.
- may enjoin where injury public, 1303, 1304, 1554.
- can not enjoin issuance of municipal-aid bonds, 1554.
- right of, to interfere with corporation, 1554, n.
- information by, requisites of, 1570.
- fees of, as damages on dissolution of injunction, 1688, n.

## AWARDS,

- actions upon, when enjoined, 78.
- judgments on, 273-276.
  - when enjoined, 273.
  - not enjoined, 274.
  - diligence necessary, 275.
  - false testimony, 276.
- for partition, not enjoined when invalid upon its face, 375.
- sustaining patents, *res judicata*, 957.

## B.

## BANKING — BANKS,

- in violation of statute, not enjoined, 20.
- election of directors, injunction refused, 25.
- loan in excess of lawful amount, 1180.
- possession of rights by, not considered, 1188.

THE REFERENCES ARE TO THE SECTIONS.

**BANKING — BANKS — *Continued.***

jurisdiction restraining, purely statutory, 1189.  
stockholder may enjoin unauthorized acts by, 1204.  
consent to change savings deposit into stock, 1212.  
continuance of one as shareholder of, enjoined, 1219.  
colorable transfers of stock to avoid charter regulations, 1232.  
principal refused relief when money deposited to agent's account, 1559, n.

**BANKRUPTCY,**

failure to plead discharge, judgment not enjoined, 181.  
proceedings in, injunctions in aid of, 282-303.  
    proceedings in state courts enjoined under act of 1867, 282.  
    source of the jurisdiction, 282.  
    executions on judgments after petition filed enjoined, 283.  
    extent of the jurisdiction, 284.  
    cases not withdrawn from state courts, 285.  
    fraudulent agreement with bankrupt, creditors enjoined, 285.  
    when injunction dissolved, 286.  
    *bona fide* judgment creditors not enjoined, 287.  
        sale of homestead by, 288.  
    knowledge by creditors of bankruptcy, 289.  
    sale of real estate under judgment enjoined, 289.  
        not enjoined, 290.  
    assignee in bankruptcy, what may enjoin, 291.  
    receiver of state court not interfered with, 292.  
    otherwise, if bankrupt court has prior jurisdiction, 292.  
    when creditor in contempt for selling, 293.  
    when bankrupt in contempt, 293.  
    relief against mortgages, 294.  
    interference with vessel enjoined, 295.  
    sale of bankrupt's property acquired after adjudication, 296.  
        effect of such injunction, 296.  
    payment of judgment by sureties, 296.  
    failure to plead discharge, 296.  
    discharge under state laws, effect of, 297.  
    United States marshal not protected in taking property of third person, 298.  
    composition in, suits enjoined pending, 299.  
    debtor not enjoined from taking benefit of bankrupt law, 300.

## THE REFERENCES ARE TO THE SECTIONS.

**BANKRUPTCY** — *Continued.*

- false verification of petition, injunction dissolved, 301.
- formal pleadings unnecessary, 302.
- notice of application, 302.
- discharge dissolves injunction, 303.

**BILL OF EXCEPTIONS,**

- mistake in, no ground for enjoining writ of error, 47.
- affidavits on appeal should be preserved in, 1697.

**BILL FOR INJUNCTION,**

- should show primary equity, 7.
- usually necessary, 31.
- when unnecessary, 31, 32.
- positive averments necessary in, 34.
- averments on information and belief, 35.
- verification of bill, 36.
- supplemental, relief on, 39.
- second, when relief denied on, 40.
- amended, relief on, 41.
- against actions at law, requisites of, 56.
- to restrain sale of trust property, requisites of, 119.
- to enjoin judgment, how far original, 132.
- parties to, 132.
- breach of contract in restraint of trade, 1180.
- fraud on part of corporation must be positively averred and sworn to, 1184.
- to enjoin corporate election, requisites of, 1230, n.
- supplemental not necessary when second county order issued to avoid injunction against first, 1239.
- failure to file original or amended, 1583.
- scandalous matter must be expunged, 1588.

**BILL OF PEACE,**

- injunction on, 61.
- distinguished from bill to consolidate, 62.
- when will not lie to enjoin revenue tax, 508.

**BILL OF SALE,**

- sale under, when enjoined, 477.
- fraudulent transfer of debtor's property under, enjoined by general creditor under statute, 1407.

**BOARD OF EQUALIZATION** (see **TAXES**),

- action of, as affecting right to enjoin tax, 493-495.

**BOARD OF HEALTH,**

- illegal ordinance of, against act not a nuisance, enjoined, 1248.

**BOARD OF TRADE,**

- injunction not granted to restore to membership of, 1194.
- enjoined from discrimination in market quotations, 1202 a.

## THE REFERENCES ARE TO THE SECTIONS.

- BOND** (see **INJUNCTION BOND**; **INDEMNITY BOND**),  
 action to recover penalty on, formerly enjoined, 71.  
 for purchase of office, action enjoined, 71.  
     of personal property, suit not enjoined, 80.  
 suit on, parol waiver of forfeiture, 94.  
 of administrator, when suit enjoined, 94.  
 forged assignment of, judgment enjoined, 197.  
 forthcoming, when judgment enjoined, 198.  
 for conveyance, when injunction allowed against collection of  
     purchase money, 390, 391.  
 when taken in lieu of injunction, 968, 1497.  
 holder of city, can enjoin breach of contract, 1268.  
 municipal-aid subscriptions, 1282-1297.  
 issuance of, in violation of compromise, enjoined, 1310.  
 when principal will be in default, removal of mortgaged prop-  
     erty enjoined, 1378.  
 on official, enjoining suit until account taken, 1386, n.  
 filing of, when made condition upon which injunction issues,  
     1429, 1496.  
 insufficient, court will continue injunction until new bond can  
     be filed, 1842.  
 of municipality in aid of railway, attorney-general can not  
     enjoin, 1554.  
 state can not enjoin issue by county court, 1556.  
 tax payer may enjoin delivery of illegal; how action should be  
     brought, 1560.  
 of state, owner of, can enjoin diversion of funds, 1561.  
 amount of appeal, on dissolving injunction against judgment,  
     1711.
- BOOM COMPANY**,  
 rights granted to, considered public, 905.
- BOUNDARIES**,  
 confusion of, what must be shown, 100, 343.
- BOUNTIES**,  
 taxes in payment of, injunctions concerning, 570-572.  
 when tax legalized injunction dissolved, 1488.
- BRIDGE**,  
 improper use of by lessee, enjoined, 435.  
 questions of nuisance concerning, 833-838.  
 franchise in, 917-926.  
 mill owner can not enjoin rightful repair of, by municipality,  
     1240.  
 approach to, 1280.

THE REFERENCES ARE TO THE SECTIONS.

BROKERS. (See FACTORS.)

BUILDING INSPECTOR,

unauthorized tearing down by, restrained, 704.

BURIAL GROUND,

property dedicated to, protected by injunction, 316, 703.

disinterment of bodies in, not enjoined, 351, 853.

unauthorized interference with, enjoined, 703.

when not enjoined as a nuisance, 792 *a*.

change of avenues in, enjoined, 893.

right of tenants in common to interfere with each other, 1199, *n*.

violation of, enjoined against holder of legal title, 1558.

## C.

CANAL—CANAL COMPANY,

in conflict with railroad, paramount right respected, 600.

when construction by, not enjoined, 603.

filling up canal, when enjoined, 612.

basin connecting with, not enjoined, 874.

mill owner can not interfere with, 882.

obstruction to tow path enjoined, 894.

when grant to, not exclusive, railway may cross, 902.

discretion of commissioners, 1185, 1186.

officers of, enjoined by the United States, 1221.

repeated actions against, for passage of boats, when contempt, 1446.

CAPITAL STOCK (see CORPORATIONS),

subscribers to, can not enjoin act *ultra vires*, 1228.

released by change in nature of enterprise, 1291.

CATTLE-GAPS,

construction of, not enforced, 640.

CATTLE-YARDS,

nuisance from, enjoined, 775.

CESTUI QUE TRUST,

protected against misconduct of trustees, 24.

insolvent, when enjoined from collecting judgment, 244.

protected against sale of real estate, 371.

when not heard on motion to dissolve, 1500.

CHATTEL,

injunction granted against removal of, 1122.

disposition of by partner enjoined, 1338.

by agent enjoined, 1559.



THE REFERENCES ARE TO THE SECTIONS.

## CHATTEL MORTGAGE,

- sale under, enjoined in bankruptcy, 294.
- enjoined when bonds illegal, 461 *a*.
- removal under, when enjoined, 468.
- equity of redemption under, sale of enjoined, 468.
- when sale enjoined, 468.
- judicial sale of property, not enjoined, 470.
- mortgagee can not enjoin sale by judgment creditor, 471.
- mortgagor restrained from commission of waste, 695.
- where consideration fails, 1128.
- sale under fraudulent, by insolvent executor, enjoined, 1366.

## CHILDREN,

- sale of property held in trust, enjoined; interference with custody of, pending divorce proceedings, 1393.
- agreement giving wife control of, 1398.
- removal of, from country, 1398.

## CHURCHES. (See ECCLESIASTICAL MATTERS.)

## CITY (see MUNICIPAL CORPORATIONS),

- can not enjoin construction of railway in street, 826.
- or of aqueduct, 833, *n*.
- two common councils, 1249, *n*., 1312, *n*.
- city and board of commissioners proper parties defendant in enjoining issuance of bonds, 1297.
- necessary party in action to enjoin payment of police officers, 1307.
- passage of resolution by common council, when a contempt, 1443.
- counsel fees when collection of tax by, enjoined, 1691.

## CITY SCRIP,

- issued to pay rent, not enjoined, 1240.

## CLERGYMAN. (See ECCLESIASTICAL MATTERS.)

## CLOUD UPON TITLE,

- sale under judgment, when enjoined, 248.
- not enjoined, 249.
- injunctions for prevention of, 372-381.
  - foundation of the jurisdiction, 372.
  - sale which will cloud title enjoined, 372.
  - test in determining, 373.
  - enforcement of satisfied judgment, 374.
  - illegality must be *dehors* the record, 375.
  - records of United States land office not within rule, 376.
- not allowed when remedy at law, 377.
- sheriff's sale, 377.

THE REFERENCES ARE TO THE SECTIONS.

**CLOUD UPON TITLE** — *Continued.*

- tax deeds, 377.
- rights of purchasers, 377.
- judgment creditors, when enjoined, 377.
- improper assessment for opening streets, 377.
- issuing patent not enjoined, 377.
- carelessness in examining title a bar to relief, 378.
- sale under judgment against vendor, vendee may enjoin, 379.
- plaintiff must have title, 380.
- administrator, when denied relief, 380.
  - when enjoined from selling, 381.
- ejectment enjoined to prevent, 420.
- proceedings under mortgage enjoined for prevention of, 469.
- taxes enjoined for prevention of, 524-529.

**COMMISSIONERS,**

- enjoined from holding election for directors, 1230.
- authorized by legislature to issue bonds, not enjoined, 1304.
- appropriation of private property by, enjoined, 1308.
- negligent doing of lawful act, ground for relief, 1309.
- of police, injunction pending trial of validity of election law, 1312.
- excess of powers by drainage, enjoined, 1320.

**COMMON INJUNCTION,**

- definition of, 6.
- practice on dissolution of, 1605, 1606.

**CONDEMNATION** (see RAILWAYS),

- of part of street railway company, when enjoined, 611.
- proceedings by railroad not enjoined, 644, 645.
- injunction conditioned upon, will issue when, 830.
- building of rival ferry by county without, enjoined, 933.
- opening street without, enjoined, 1272, 1273.
  - improvements by owner not enjoined, 1273.
- closing up street enjoined upon tender of award, 1277.

**CONDITIONS,**

- non-compliance with statutory, in issuing bonds, 1285, 1289, 1290.
- on which relief granted, compliance with by plaintiff necessary, 1429.
  - filing bond, filing bill, 1429.

**CONFESSION OF JUDGMENT,**

- as a condition of enjoining actions at law, 59, 60.
- fraudulent, not enjoined by debtor, 205.

## THE REFERENCES ARE TO THE SECTIONS.

CONFESSION OF JUDGMENT — *Continued.*

not ordinarily enjoined, 279.

when enjoined, 280.

enjoined in action upon in other state, 281.

on authorized debt, shareholder can not enjoin, 1214.

power to, after partner enjoined from meddling with firm assets, 1335.

by debtor, contract creditor can not enjoin, 1403.

## CONSENT.

injunction by, not allowed in improper case, 31.

in patent case, 952.

vacation of street without, enjoined, 1247.

to violation of injunction, creates an estoppel, 1437.

## CONSIDERATION (see PROMISSORY NOTES),

failure of, as ground for enjoining judgment, 134.

action on note, 1129.

of contract in restraint of trade, 1179.

of note, failure of, executor may enjoin, 1369.

of injunction bond, 1624.

## CONSOLIDATION,

of suits, injunction refused, 62.

of railroads, tax in aid of one not enjoined, 566.

when enjoined, 605.

when not enjoined, 914.

unauthorized, enjoined, 1211.

## CONSPIRACY,

by minority of shareholders to control elections enjoined, 1233.

## CONSTRUCTION,

“contrary to law” includes “contrary to equity,” 1338, n.

## CONTEMPT OF COURT (see VIOLATION),

punishment for, not enjoined, 272.

in disregarding injunction in bankruptcy, 293.

against use of one's own name, 1069.

disregard of void injunction, not a, 1286, 1425.

## CONTRACTS,

between two railways, breach of, enjoined, 608.

by owner of right of way bars relief, 632, 633.

laying of tramway in violation of, enjoined, 838.

effect of, between author and publisher, 997.

between reporter and publisher, when right given to renew copyright, 1058.

for sole publication, publisher treated as assignee, 1059.

between author and publisher, when personal, 1061.

nature and grounds of the jurisdiction, 1106-1122.

THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

- foundation of the relief, 1106.
  - contract must be clear and injury irreparable, 1106.
- remedy at law a bar to relief, 1107.
  - railway-construction contract, 1107.
  - bond void *ab initio*, 1107.
  - further illustrations, 1107.
- fraud, a ground for relief, 1108.
  - annuity, when representations of value of property false, 1108.
  - when mortgagor is of weak mind, 1108.
  - improper diversion of fund, 1108.
  - secret process of manufacture protected, 1108.
- must be susceptible of specific performance, 1109.
  - illustration, 1109.
- when injunction will afford substantial justice relief allowed, 1109.
- injunctions against actions on, 1110.
  - to prevent a forfeiture, 1110.
- violation of railway-operating contracts enjoined, 1111.
  - where terminated by notice relief refused, 1111.
- to employ one as agent not enforced, 1112.
- assignee protected, 1113.
  - assignor enjoined from interfering, 1113.
- conveyance for church purposes, 1114.
- subscription to educational institutions, 1114.
- when judgment on gaming contract enjoined, 1115.
  - innocent holder, 1115.
- usurious contracts, 1116.
  - where judgment recovered at law, 1117.
  - where transaction very complicated, 1117.
- injunction against entering into contracts *pendente lite*, 1118.
  - convenience and inconvenience, 1118.
- plaintiff must not have violated the contract, 1119.
- diligence required, 1119.
- injunction in aid of specific performance, 1120.
  - to restrain sale of real estate, 1120.
  - relief ancillary to main relief, 1120.
  - where contract uncertain, 1120, 1121.
  - when right of parties unascertained, 1120.
  - when performance can not be enforced, 1121.
  - departure from original contract, 1121.
  - when case doubtful, convenience considered, 1121.
  - chattel, 1122.

## THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

promissory notes, 1123-1133.

fraud, undue influence, or duress a ground for relief,  
1123, 1126.

threats to prosecute for perjury, 1123.

person of weak mind, 1123.

failure of patent, 1123.

violation of trust enjoined, 1124.

assignee with knowledge enjoined, 1124.

*bona fide* holder, 1124.

neglect of payee to indorse a payment, 1124.

effect of injunction restraining payment, 1125.

parties should be made defendants, 1125.

given on attaining majority, 1126.

abuse of judicial process, 1126.

marriage brokerage, 1127.

when declared void by foreign court, 1127.

note given for money lost at play, 1127.

insolvency of one where debts are mutual, 1128.

fraudulent representations on sale of personal  
property, 1128.

failure of consideration, 1128, 1129.

when note past due, 1129.

where defects existed in article sold, 1129.

loan by bank in excess of lawful amount, 1130.

maker of accommodation paper can not enjoin, 1131.

administrator may enjoin actions on notes delivered  
after death, 1132.

effect of injunction, 1133.

statute of limitations, 1133.

assignment of, after, 1133.

interest, 1133.

negative contracts, 1134-1166.

remedy analogous to specific performance, 1134.

covenant between author and publisher, 1134.

relative convenience not considered when right clear  
and violation apparent, 1135.

proof of actual damage unnecessary, 1135.

when work is of public importance, 1135.

when covenant vague, 1135.

when the doctrine applies, 1136.

when agreement contains other covenants, 1136.

certainty essential, 1137.

some appreciable damage necessary, 1137.

raising level of stream, 1137.

THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

- threatened breach sufficient, 1137.
- effect of recitals in agreement, 1138.
- provision for re-entry no bar to relief, 1138, 1144.
- penalty and liquidated damages, 1139.
  - test, 1140.
- whether party in possession, or a reversioner or remainder-man, 1141.
- if latter, special damage necessary, 1141.
  - use of dwelling for trade, 1141.
- restrictive covenants in leases, 1142.
  - conversion of meadow land, 1142.
  - against mowing, 1142.
  - multiplicity of suits, 1142.
  - particular use, 1143.
  - acquiescence, 1143, 1145.
  - no title acquired, 1143.
  - machinery in mines, 1144.
  - use for school purposes, 1144.
  - sub-lessee bound by, 1144.
  - assignee bound by, 1144.
  - use of dwelling for public house, 1144.
  - sub-lessee bound by constructive notice, 1144.
  - covenant not to annoy neighborhood, 1145.
  - signs, 1145.
  - act need not be a nuisance, 1146.
  - permission to carry on one trade no bar to objection against another, 1146.
  - will not enjoin judgment for breach of covenant, 1146.
  - when covenant harsh and oppressive relief refused, 1146.
  - effect of fraud, 1147.
    - sub-lessee may compel compliance with surrendered lease, 1147.
  - receiver entitled to relief, 1148.
  - lessee of adjoining premises not entitled to injunction, 1149.
  - lessee as well as lessor protected, 1150.
    - cutting down trees, 1150.
    - erection of building, 1150.
    - injunction made mandatory, 1150.
    - exclusive shooting privilege, 1150.
  - further illustrations, 1151.
  - subsequent lessees of original lessor enjoined, 1151.
  - against erection of hotel, 1152.

## THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

- covenant need not run with the land, 1152.
- where land sold in building lots, 1152.
- restrictive covenants in conveyances of realty, 1153.
  - building regulations, 1153.
  - threats of breach sufficient, 1153.
  - small excess in height of building, 1153.
  - purchasers, assigns and sub-lessee bound by, 1154.
  - lessee bound by, 1154.
  - covenant to supply water from well, 1155.
  - sole right to sell ale, 1155.
  - construction of the term "adjoining," 1156.
  - school house not a nuisance, 1156.
  - relief as between different purchasers, 1157.
  - demurrer admits poetical allegations of fact, 1157.
  - where breach clear actual damage need not be shown, 1158.
  - mandatory injunction, 1158.
  - vendor enjoined from breach, 1158.
  - such change in premises as to make covenant inapplicable, 1158.
  - diligence; laches; acquiescence, 1159.
  - acquiescence in violation of one covenant no bar to injunction in case of another, 1159.
- contracts of hiring and service not enforced, 1160.
- contra*, when agreement added to furnish articles for sale, 1160.
- covenant not to impart information enforced, 1161.
- impossibility of specific performance ground for refusing relief, 1162.
  - to keep an inn, 1162.
  - to take notes of cases, 1162.
  - to manage railroad, 1162.
- contract for theatrical and operatic performances, 1163.
  - former doctrine, 1163.
  - later doctrine, 1164.
  - negative covenant implied, 1164.
- negative agreement distinct from affirmative, enforced, 1165.
- purely negative agreement enforced, 1166.
  - between partners, 1166.
- what material to give jurisdiction, 1166.
- in restraint of trade, 1167-1183.
  - general restraint void, 1167.
  - partial restraint good, 1167.
  - grounds of the jurisdiction, 1168.
  - illustrations of the relief, 1168.

## THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

- no restrictive covenant implied in sale of good-will, 1169.  
*contra*, in Massachusetts, 1169.
- written contract not necessary, 1170.  
illustrations, 1170.
- express limitation as to extent of restriction not necessary, 1170.
- contract not to publish receipt books within the state enforced, 1171.
- corporation with notice bound, 1171.
- manner of resuming business immaterial, 1172.  
selling on commission, 1172.
- contract to employ one who agrees not to carry on business, 1173.
- working as journeyman tailor enjoined, 1173.
- relief where restriction unlimited, 1174.
- sale of letters patent; carrying on trade in Europe, 1174.  
other illustrations, 1174.
- liquidated damage, 1175.
- resuming business in employ of third person, 1172, 1173, 1176.
- loaning money on similar business, 1176.  
acting as manager for another, 1177.
- contract must be certain and violation clear, 1178.  
indefinite, relief refused, 1178.
- consideration, 1179.
- plaintiff must have legal interest, 1179.  
corporation can not enforce agreement with stockholder, 1179.
- what must be shown by bill, 1180.
- covenants against publication enforced, 1181.  
one with notice bound, 1181.  
representations of sale by one, operate as an estoppel, 1181.
- plaintiff not allowed both injunction and damages, 1182.
- injunction dissolved when action brought at law, 1182.
- when assignee of notes enjoined, 1183.
- exclusive between city and water company, protected, 1183 *a*.
- submission of unauthorized contract to arbitration enjoined, 1226.
- letting of, to lowest bidder, 1251, 1252.
- making of, within municipal authority not enjoined, 1255.
- violation of, not enjoined, 1326, *n*.
- between newspapers to furnish news, 1330.
- agreement not to continue business after dissolution, 1343.  
for dissolution enforced, 1348.



## THE REFERENCES ARE TO THE SECTIONS.

CONTRACTS — *Continued.*

- agreement not to sue principal debtor, surety may enjoin, 1376.
- allowing default, by surety on agreement not to take out execution, 1381.
- violation of agreement to furnish co-surety, ground for relief, 1386.
- agreement not to institute divorce proceedings, 1398.
- to give wife control of children, 1398.

## CONTRIBUTION,

- suit for between sureties, not enjoined, 1385.

## CONVENIENCE AND INCONVENIENCE,

- considered in granting mandatory injunction, 2.
- doctrine of, when right not clear, 13.
- considered in enjoining construction of railroad, 598, 603.
- when right to franchise doubtful, 921, 924.
- in patent cases, 937.
- not considered when right to patent established, and violation clear, 962.
- in copyright cases, 1026.
- considered when enjoining making of contracts, 1118.
- in negative contracts, 1135, 1136.
- on motion to dissolve, 1495.

## CONVEYANCE,

- loss of, as ground for enjoining action, 47, 357.
- sale, 327.
- action to set aside, when injunction allowed, 329.
- effect of, pending injunction, 338.
- instead of mortgage, when sale under enjoined, 455.

## COPYRIGHT,

- nature of the right and its infringement, 988-1021.
- foundation of jurisdiction, 988.
- superiority of equitable remedy, 988.
- jurisdiction of the courts, federal and state, 989.
- statutory and common law right, 989.
- distinction between, 989.
- strict compliance with statutory conditions necessary, 990.
- demurrer for failure to aver, 990.
- when title protected, 991.
- is incorporeal, 992.
- purchaser of plate enjoined from printing therefrom, 992.
- absolute originality not essential, 993.
- grammar, 993.
- dictionary, 993.

## THE REFERENCES ARE TO THE SECTIONS.

COPYRIGHT — *Continued.*

- subsequent writer must go to common sources, 994.
  - city directories, 994.
    - partial verification, 994.
    - almanac taken from, 994.
    - advertisements, 994, n.
- work partly mechanical protected, 995.
  - printed diary, 995.
- statistical tables, 996.
  - acknowledging source, 996.
- taking actual words from plaintiff's book, 996.
- effect of contract between author and publisher, 997.
- restrictive covenant by author, 998.
  - publication of rival work, 998.
  - distinction between writing and publishing, 998.
- artist in government employ, 999.
- assistance given publishers, 999.
- unauthorized copy of painting, 1000.
  - engraving in magazine, 1000.
  - public exhibition, 1000.
    - diorama, 1000.
- sale of etchings surreptitiously obtained, enjoined, 1000.
- English copyright includes illustrations, 1001.
- law reports, 1002, 1003, 1010.
  - published under contract, 1003.
    - acknowledgment, 1003.
- doctrine as to extracts, 1004, 1007, 1025, 1051.
- maps and charts, 1005.
  - may use preceding, to produce an original result, 1005.
- court calendar protected, 1005.
- nature and objects of selections as well as quantity considered, 1006.
- value of materials taken, 1006.
- adoption of plaintiff's arrangement enjoined, 1007.
- when extracts supersede former work, 1007.
- test, whether defendant has availed himself of common sources, 1007.
- use of authorities not enjoined, 1007.
- abridgments, 1008.
- distinction between compilation and abridgment, 1009.
- piracy of part enjoined, 1009.
- how far compilation protected, 1010.
  - colorable abridgment of law reports, 1010.
  - unpublished manuscript protected, 1011, 1049, 1051.
    - deposit of, for particular purpose, 1011.

THE REFERENCES ARE TO THE SECTIONS.

COPYRIGHT — *Continued.*

- publication of private letters, enjoined, 1012.
  - literary productions or business or private letters, 1012.
  - receiver may enjoin, 1012.
  - for vindication of character, 1012.
  - containing notice of infringement of patent, 1012, n., 1015.
- scientific lectures, 1013.
- system of instruction, 1013.
- original work under same title not enjoined, 1014.
- publication of magazine as a continuance of complainant's, enjoined, 1014.
- libelous publication, conflict of authority, 1015.
- translations, 1016.
  - of foreign works, copyright of protected, 1016.
- public readings and plays, not enjoined, 1017.
  - copies must not be distributed, 1017.
- publication of play taken from plaintiff's book enjoined, 1017.
- newspaper entitled to protection, 1018.
- descriptive advertisement is not, 1018.
- representing defendant's work as that of plaintiff, 1019.
- copyright in part of book protected, 1020.
  - infringement of part enjoined, 1020.
    - when pirated parts not definitely ascertained, 1020.
- accounting incidental to relief, 1021.
- principles governing the jurisdiction, 1022-1037.
  - general doctrine, 1022.
  - establishing right at law, 1023.
    - prima facie* title sufficient, 1023.
  - right in the extended term, 1023, n.
  - how piracy determined, 1024.
    - by court or master, 1024.
  - if infringement clear, intent immaterial, 1024.
    - animus furandi* presumed, 1025.
  - where extracts constitute chief value of defendant's work, 1025.
  - deception of purchasers, 1025.
  - copying errors, test of piracy, 1025.
  - doctrine of relative convenience, 1026.
  - court may require an account to be kept, 1026.
  - when copyright or infringement doubtful, relief refused, 1026.

THE REFERENCES ARE TO THE SECTIONS.

**COPYRIGHT** — *Continued.*

- piracy not protected, 1027.
- immoral and irreligious works, 1027.
- acquiescence and laches a bar, 1028.
  - illustrations, 1029.
  - foundation of the doctrine, 1030.
  - burden of proof of, 1030.
  - no acquiescence without knowledge, 1031.
    - book obsolete, 1031.
    - knowledge of advertising and sale no bar, 1031.
- usage as to reviewing magazines, and publications of portions of, no bar to relief, 1032.
- when doubtful whether action at law would lie, relief refused, 1033.
- difficulty in estimating profits, no bar, 1033.
- when piracy established, effect on sale of defendant's work no bar, 1034.
- restrictive covenant by author, 1035.
  - purchase by publisher with notice or without, 1035.
  - publication of daily journal by vendor of weekly, 1035.
- what sufficient allegation of piracy, 1036.
- where no identification of parts pirated, and affidavits deny equities of bill, 1036.
- injunction granted conditioned upon action at law, 1037.
  - defendant can not continue sale pending, 1037.
- dramatic compositions, 1038-1052.
  - distinction between statutory and common law right, 1038.
    - alienage of author no bar, 1038.
    - purchaser may enjoin, 1038.
  - jurisdiction of state and federal courts, 1038.
  - representation of play not such publication as to bar relief, 1039.
    - one who procures play from persons who have seen it, enjoined, 1039.
    - representation does not prevent copyright, 1039.
  - English doctrine the reverse, 1040.
  - unauthorized production of play enjoined, 1041.
  - permission to publish novel founded on, not a dedication to the public, 1041.

THE REFERENCES ARE TO THE SECTIONS.

**COPYRIGHT** — *Continued.*

- original adaptation protected, 1042.
  - may be produced by more than one, 1042.
- memorization of play, 1043.
  - by short-hand, 1043.
- strict compliance with statutory conditions necessary, 1044.
  - how compliance averred, 1044.
  - clerk's certificate *prima facie* evidence, 1044.
- title of play not protected, 1045.
- dramatization of novel taken from play, enjoined, 1046.
- where plaintiff's play mere colorable imitation of defendant's, relief refused, 1046.
- where both are wrong-doers, 1046.
- scenic or spectacular effects, 1047.
  - "railroad scene," 1047, n.
- immoral play not protected, 1048.
  - when charge of immorality not sustained, 1048.
- unpublished manuscript protected by act of congress, 1049.
- translations protected, 1050.
- publication in magazine enjoined, 1051.
  - of extracts in critical work, not enjoined, 1051.
- deposit of money in lieu of injunction, 1052.
- musical compositions**, 1053-1056.
  - test applied to determine infringement, 1053.
  - publication of waltzes from opera, 1053.
  - what constitutes an author, 1054.
  - production of new result protected, 1054.
  - performance of opera in connection with play enjoined, 1054.
    - even though labor of third person intervened, 1054.
  - publication of song under same title enjoined, 1055.
    - deception of public, 1055.
    - may require action at law and bond, 1055.
  - when originality doubtful, action at law required, 1055.
  - effect of laches or acquiescence, 1056.
    - onus* on defendant, 1056.
- parties**, 1057-1062.
  - assignee protected, 1057.
    - of particular localities protected, 1057.
  - assignor not a necessary party, 1057.

THE REFERENCES ARE TO THE SECTIONS.

**COPYRIGHT** — *Continued.*

- executor of law reporter can not enjoin publication under renewal, 1058.
- when publisher protected as assignee, 1059.
  - when pirated parts are contained in previous editions of the author, 1059.
- equitable owner protected, 1060.
  - when assignment is verbal, 1060.
    - author has permitted infringement, 1060.
    - when assignment is verbal, 1060.
- owner of legal title should be joined, 1060, n.
- when contract of personal nature, assignee of one can not enjoin the other, 1061.
- vendor of infringing work enjoined, 1062.
- sale of for one state, enforced, 1171.

**CORPORATIONS** (see **MUNICIPAL CORPORATIONS**),

- right of, to petition legislature, not enjoined, 26.
- foreign, not enjoined from mortgaging property, 476.
- taxation of stock and franchises of, when not enjoined, 493.
- tax on capital stock and franchise of, when enjoined, 506.
- tax against, fixed by arbitration, when enjoined, 513.
- exempt from taxation, injunction allowed, 531.
- foreign, enjoined by people from erection of piers, 710.
- name of, protected as a trade mark, 1081.
- can not enforce agreement made with stockholder, 1179.
- governing principles, 1184-1202 *a*.
- jurisdiction founded in trust, 1184.
- must be transcending charter, injury must be irreparable, 1184.
- fraud must be positively averred and sworn to, 1184.
- jurisdiction cautiously exercised, 1185.
  - remedy at law, 1185.
  - rarely granted without notice, 1185.
- discretion of corporate bodies rarely interfered with, 1186.
  - of canal commissioners, 1186.
  - location of railway, 1186.
- subject, however, to legal judgment, 1186.
- continuing trespass, ground for relief, 1187.
- questions concerning chartered rights not considered in equity, 1188.
  - bank not a nuisance, 1188.
  - fraudulent organization of railway, 1188.
- jurisdiction restraining banks purely statutory, 1189.
  - affidavits of insolvency of, suspension of specie payments, 1189.

THE REFERENCES ARE TO THE SECTIONS.

**CORPORATIONS** — *Continued.*

- insurance companies, 1189, n.
- payment of dividends by foreign, not enjoined, 1190.
- illegal issue of stock by company incorporated in two states, 1190.
  - to officer, enjoined, 1190.
- defect in joinder of parties, 1191.
  - omission of corporation, 1191.
  - party to whom sale is to be made, 1191.
- diversion of funds enjoined, 1192.
- radical change in character of enterprise, 1192.
- where receiver main relief, officers not enjoined from acting, 1192.
- equity will not interfere with election to membership, 1193.
- expulsion and discipline of members, 1194.
  - medical association, 1194.
- relief not granted to restore to membership, 1194.
  - acquiescence in removal, 1194.
  - removal without notice or hearing, 1194, n.
- rights of creditors on winding up, 1195.
  - recovery on day of, 1195.
  - delay in application of property to payments, 1195.
  - recovery before institution of proceedings, 1195.
  - enjoining at the same time with rule to show cause, 1195.
  - enjoined by receiver from suing insolvent, 1196.
- gross mismanagement and waste of funds of, 1197.
- on appointment of receiver, officers enjoined from collecting debts, 1197.
- dissolution of, enjoined pending action to determine liability, 1198.
- directors can not contract with, 1199.
  - tax payer can enjoin, 1199.
- directors must first use their own powers of regulation, 1199.
- attorney-general can not interfere with directorship of railway, 1199.
- gross abuse of powers enjoined, 1200.
- purchase by president of indebtedness against, 1201.
- national bank not enjoined from loaning on negotiable paper, 1202.

## THE REFERENCES ARE TO THE SECTIONS.

CORPORATIONS — *Continued.*

- market quotations, discrimination enjoined, 1202 *a*.
- telegraph companies on line of railroad, 1202 *a*.
- injunctions in behalf of shareholders, 1203–1223.
  - stockholders may enjoin, 1203.
  - railway becoming stockholder in another, 1203, 1224.
  - transfer of property to another, 1203.
  - unauthorized acts by bank, 1204.
  - embezzlement by directors, 1204.
  - minority protected, 1204, 1216.
  - remedy at law, 1204, *n*.
- departure from purpose of corporation, 1205.
- erection of flouring mill by iron company, 1205.
- building small portion of road, 1205.
  - acquiescence, 1205.
  - completion of, 1205, 1229.
- diligence required, 1206.
  - non-completion of railway, 1206.
  - assignee bound by acquiescence of his vendor, 1206.
- single shareholder allowed relief, 1207.
  - injury must be real, 1207.
  - when plaintiff merely colorable, 1207, 1214.
- applications to legislature to extend powers, when enjoined, 1208, 1209.
  - acts in furtherance of object not enjoined, 1210.
  - officers not enjoined from exercising functions, 1210.
  - unauthorized consolidation enjoined, 1211.
    - property already transferred, 1211.
  - may waive right, 1212.
    - consent to change of deposit into stock, 1212.
  - stands in position of general creditor of, 1213.
  - judgment confessed for authorized debt not enjoined, 1214.
  - bill in aid of others, 1214.
  - bona fide* lease not enjoined, 1215.
  - minority protected against majority, 1204, 1216.
  - payment of illegal dividends enjoined, 1217.
    - future only enjoined, when all not parties, 1217.
    - when plaintiff seeks specific performance of contract, 1217.
  - proceedings, officers should be requested to take proper, 1218.
  - sale of property on execution, 1218.



THE REFERENCES ARE TO THE SECTIONS.

CORPORATIONS — *Continued.*

- when judgment binding on shareholders, 1218.
- judgment in favor of receiver for unpaid subscriptions, 1218.
- continuance of name as shareholder enjoined, 1219.
- relieved against sale of stock for assessments when tender made, 1219.
- transfer of lost shares of mining stock enjoined, 1220.
- officers of canals enjoined by United States, 1221.
- relief refused against allowance of improper account, 1222.
- bound by rules existing when he becomes a member, 1223.
- ultra vires*, 1224-1229.
  - excess of authority enjoined, 1224.
    - selling coal by railway, 1224.
    - attorney-general upon relation of private person may sue, 1224.
    - steam packet company in connection with railway, 1224.
    - purchase of shares in another railway company, 1224.
    - misappropriation of fund, 1225.
    - suit not instituted by, 1225.
  - majority can not bind minority when act *ultra vires*, 1225.
    - issue of preferred stock, 1226.
    - arbitration of contract *ultra vires*, 1226.
  - shareholders may enjoin lease of entire property, 1227.
    - bona fides* of, considered, 1227.
  - plaintiffs must be actual shareholders, 1228.
    - subscribers to stock, 1228.
  - acquiescence of shareholder bars relief, 1229.
    - in purchase of railway, 1229.
  - lease *ultra vires*, injunction against resuming possession, 1229.
- corporate elections, 1230-1235.
  - jurisdiction of American origin, 1230.
    - requisites of bill, 1230, n.
  - fraudulent issue of stock by directors to themselves, 1231.
    - acceptance of dividend not a ratification, 1231.
  - issue of stock to control approaching election, 1231.

THE REFERENCES ARE TO THE SECTIONS.

**CORPORATIONS** — *Continued.*

- charter regulations for voting, 1232.
- colorable transfers of stock, 1232.
- statutory regulations for, no bar, 1232.
- conspiracy by minority to control election, 1233.
- laches in canceling illegal issue of stock a bar to relief, 1234.
- equity does not determine title to corporate offices, 1235.
- fraud, 1235.
- protection of property rights only ground for interference, 1235.
- reading writ to president in presence of other officers, 1424.
- punishable for contempt, 1460.
- answer by, on motion to dissolve, 1519.
- when several defendants, 1531.
- impossibility of procuring answer of foreign, 1531.
- injunction dissolved on answer of, although officers have not answered, 1534.
- right of attorney-general to interfere with, 1554, n.
- omission of, when members are parties, no ground for dissolution, 1564.
- verification of bill by, 1568.

**COSTS** (see DAMAGES),

- in criminal proceedings, not enjoined, 20.
- when violation clear, but service defective, 1465.
- discretion as to, in dissolving injunction against action at law, 1541.

**COUNSEL** (see ATTORNEYS),

- fees of, on dissolution, 1685-1692.

**COUNTY,**

- illegality of organization of, no ground for relief, 1249.
- creditor can not enjoin change of boundary in, 1254.
- removal of county seat, 1257, 1258, 1321.
- contracting excessive indebtedness in Indiana, 1262, n.
- creation of new, when illegal, enjoined; already created, 1319.
- commissioners of, lease of public square by, lot owners can not enjoin, 1553.

**COUNTY CLERK.** (See TAXES.)

**COUNTY COLLECTOR.** (See TAXES.)

**COUNTY TREASURER.** (See TAXES.)

**COURTS,**

- of co-ordinate jurisdiction, principles governing, 15.
- of last resort, will not enjoin in cases pending below, 42.
- their jurisdiction over injunctions, 42.

## THE REFERENCES ARE TO THE SECTIONS.

**COURTS—***Continued.*

- circuit, statutory jurisdiction of, 43.
- of equity, proceedings in, not enjoined, 44.
  - exception in case of interpleader, 53.
- first acquiring jurisdiction, not interfered with, 50, 51.
- state and federal, injunctions as between, 108-111, 266-268.
  - question discussed on principle, 108.
  - restriction on federal courts by judiciary act, 109.
  - prior jurisdiction of federal courts protected, 110.
  - prior jurisdiction of state courts protected, 111.
- judgments considered, with reference to, 265-272.
- of United States, jurisdiction in aid of bankruptcy, 282-303.
- of United States Supreme, will enjoin bridge across river, 833.
- of United States, exclusive jurisdiction in patent cases, 934.
- jurisdiction of federal and state, in copyright, 989.
  - dramatic compositions, 1038.
- United States court will enjoin municipal-aid bond at suit of alien, 1287.
- state, will not enjoin federal officers, 1322.
- bringing action in United States courts after enjoined by state courts, a violation, 1441.
- officers of, when necessary parties in bill to enjoin sale, 1551.
- parties to bill for injunction against judgment in United States courts, 1552.
- doctrine of United States courts relating to taking of injunction bond, 1656.
- effect of writ of error from United States Supreme Court, 1699.

**COURTS OF EQUITY.** (See **COURTS.**)**COURT MARTIAL,**

- action of, not enjoined, 50.

**COVENANT** (see **CONTRACTS**; **PURCHASE MONEY**),

- injunction not granted against, 16.
- use of premises in violation of, enjoined, 691.
- to repair, no bar to injunction against destruction, 709.
- regulating use of land, violation of, enjoined, 849, 851.
  - light in the absence of, when title derived from common source, 869.
- restrictive, by author or publisher, 1035, 1134, 1181.
- negative contracts, 1134-1163.
- in restraint of trade, 1167-1183.

**CREDITORS,**

- without judgment, can not enjoin disposition of debtor's property, 131, 326, 1334.

THE REFERENCES ARE TO THE SECTIONS.

**CREDITORS** — *Continued.*

- judgment, when not enjoined in bankruptcy, 287, 288.
  - knowledge of, as to bankruptcy, 289.
- when in contempt for selling bankrupt's property, 293.
- may enjoin payment of rent by trustees to debtor, 330.
- rights of, as against devisees and heir, 339.
- judgment, sale of real estate by, when enjoined, 345.
  - when enjoined from enforcing lien, 377.
  - may enjoin mortgagee of debtor from payment to debtor, 471.
  - not enjoined from satisfaction out of mortgaged property, 471.
  - enjoined at suit of bondholders, 617.
- rights of, on winding up corporation, 1195.
- shareholder stands in position of, 1213.
- can not enjoin legal change of county boundary, 1254.
- holder of county order mere general, 1268.
  - city bond, can enjoin, 1268.
- general, can not enjoin enforcement of judgment of, against member of partnership, 1334.
  - rights of, at common law and by statute, 1337.
- may enjoin insolvent continuing partner from selling, 1342.
- may enjoin improper distribution by executor, 1361.
- decree for accounting against executor, judgment for all, 1364.
- laches of, in enforcing judgment against principal, 1381.
- sale of wife's property for husband's debt enjoined, 1387.
- purchase of mortgage of wife by judgment creditor of husband, 1388.
- general, may enjoin incumbering of wife's separate estate on bill to charge same, 1391.
- judgment, may enjoin fraudulent transfers of property, 1402.
  - bill for, injunction necessary adjunct, 1402.
- without judgment, denied relief, 1403.
  - pending trial, before judgment, relief refused, 1403.
  - disposal of money secured by embezzlement of goods, 1403.
  - mortgage sale, 1403.
  - confessing judgment by creditor not enjoined, 1403.
  - disposal of assets of railway, 1403.
- with lien, entitled to relief, 1404.
  - assignment of master's lien on freight for repairs, 1404.
  - equitable, upon particular fund, 1404.

## THE REFERENCES ARE TO THE SECTIONS.

CREDITORS — *Continued.*

rights of attaching, 1405.

prevention of multiplicity of suits, ground for relief to creditors without judgment, 1406.

debtor non-resident, numerous attachment suits, 1406.

fraudulent attachment, partial delivery of goods to creditor who sold the supplies, 1406.

where debts due from deceased debtor are made a lien by law, relief allowed, 1406.

effect of legislation modifying the rule, 1407.

fraud must be specifically averred, 1407.

transfer of all of debtor's property by fraudulent bill of sale, 1407.

English and Irish practice after decree for accounting of assets of deceased debtor, 1408.

restrained from proceedings against executor, 1408.

judgment creditor enjoined from enforcing his judgment, 1408.

legatee enjoined from suing executor at law, 1408.

relief granted on motion, 1408.

pending settlement of insolvent estate, creditor enjoined from enforcing his judgment, 1408.

when no decree, relief refused, 1409.

relief refused when executors personally liable, 1409.

supplemental proceedings under code have superseded creditors' bill, 1410.

disposal of property enjoined, where no receiver, 1410.

voluntary assignment for benefit of creditors, 1411.

when not accepted, proceedings by, not enjoined, 1411.

assignee not enjoined when no danger to estate shown, 1411.

receiver can not interfere with, unless made to defraud creditors, 1411.

sale of personal property not enjoined when remedy at law, 1412.

collusion with justice, 1412.

misappropriation of proceeds of sale, ground for enjoining further sale, 1413.

subsequently joining, bound by agreement under which injunction issued, 1414.

## THE REFERENCES ARE TO THE SECTIONS.

CREDITORS — *Continued.*

- injunction against sale of agent's property, when principal's money can not be traced, 1415.
- on dissolution may enforce execution, 1536.
  - appeal from decree dissolving, 1536.
- verification of creditors' bill, 1567.

## CREDITORS' SUITS,

- injunction against defendant in, not violated by prosecuting action against third person, 1432.
  - for tort, 1432.
  - giving draft, 1432.
- verification of bill in, 1567.

## CRIMES,

- not enjoined, 20, 27.

## CRIMINAL PROCEEDINGS,

- not enjoined, 20, 68, 272, 1244.
- judgments in, not enjoined, 124, 157.
- for nuisance, no bar to injunction, 745, 752, 770.

## CROPS,

- creditors of mortgagor, when enjoined from sale of, 255.
- sale of, by tenant in common, not enjoined, 344.
- removal of, when not enjoined, 427.
  - by tenant, when enjoined, 430.
  - as between mortgagor and mortgagee, 467.
- included in damages, on dissolution of injunction affecting real property, 1673.

## D.

## DAM,

- injunction against overflow from, 749.
- mill-dams, 839-847.

## DAMAGES (see INJUNCTION BOND),

- for detaining property, awarded in injunction suit, 135.
- on dissolution of injunction against judgment, 163.
- injunction against purchase money judgment, when refused, 251, 413.
- tender of, in opening highways, bars relief, 585.
- from construction of levees, must first be paid, 614.
- illegal exactions by railway, enjoined, 616.
- caused by construction of right of way, must first be paid, 622.
- failure to compensate for taking right of way, 622, 623.
  - statutory remedy to be first exhausted, 624.
- must be shown to enjoin nuisance, 774.
- in patent case mere question of, relief refused, 967.

THE REFERENCES ARE TO THE SECTIONS.

**DAMAGES** — *Continued.*

- what necessary in case of negative contract, 1135, 1136.
- liquidated, a bar to relief, 1139.
  - when penalty or liquidated damage, 1140.
- reversioner must show special, to enjoin breach of covenant, 1141.
- when breach of covenant clear, actual need not be shown, 1158.
- liquidated, in contracts in restraint of trade, 1175.
- plaintiff not allowed both legal and equitable relief, 1182.
- evidence of, on hearing for contempt, proper, 1459.
- only direct and immediate allowed, 1663.
  - speculative and remote, consequential, 1663.
- from opening of street, 1663.
- occasioned independently of injunction not recoverable, 1663.
  - depreciation in value when sale prevented, 1663.
- possible profit of street railway not allowed, 1664.
- from negligence of receiver not allowed, 1664.
- in absence of malice, compensation only can be recovered, 1665.
- dissolution conclusive of wrongful issuance of writ, 1665.
- expense and trouble in procuring dissolution, 1665.
- pending appeal, not allowed, 1665.
- injunction against judgment, 1666.
  - should be computed on principal, interest and costs, 1666.
  - when judgment satisfied, 1666.
  - interest on sum enjoined recoverable, 1666.
  - penalty of bond can not be recovered, 1666.
  - can not exceed penalty, 1666, 1669.
  - one not party to judgment liable for percentage on same, 1666.
  - statute fixing percentage of, as damages, does not apply to decree, 1666.
  - larger percentage error, 1666.
  - entire amount of judgment, 1666.
  - dissolution in part, 1667.
  - to recover judgment, averment of non-payment necessary, 1667.
  - are embraced in lien of judgment, 1667, n.
  - when certain specified property protected, 1668.
  - when injunction dissolved as to part, which part is afterward sold, 1668.
  - when sale of property of complainant, under execution against third person, enjoined, 1668.

## THE REFERENCES ARE TO THE SECTIONS.

**DAMAGES — Continued.**

- can not exceed penalty of bond, 1666, 1669.
- surety bound by assessment of, 1669.
- when obligation construed as several, 1669.
- necessarily implied on dissolution, 1670.
  - whether assessment made or not, 1670.
  - costs in procuring dissolution may be included, 1670.
- for restraining sale under trust deed, 1671.
  - difference in value of treasury notes and gold coin, 1671.
  - attorney's fees and costs of advertising, 1671.
  - trustee can not release damages, 1671.
- for restraining suit on note, 1672.
- when real property affected, 1673.
  - timber, wood and sand, 1673.
  - rental; crops; emblements, 1673.
  - contract to furnish lumber, 1673, n.
- when sale of real estate enjoined, 1674.
  - by one in possession under contract of purchase, 1674.
    - upon a judgment to which plaintiff was not a party, 1674.
  - when vendor enjoined from selling, 1674.
- completion of building delayed, 1675.
- defendant's duty when enjoined, 1675.
- unless diligence shown, loss of time not proper, 1676.
- defendant need not be served with process, 1677.
- costs when injunction perpetuated in part, 1678.
- when grounds for injunction removed, 1678.
  - curing defective title, 1678.
- where statute authorizes percentage of money, 1679.
  - restraining tax, 1679.
- when fraudulent vendee restrains sale under execution against debtor, 1680.
- when sale of alleged patented article enjoined, 1681.
- to real party when nominal party enjoined, 1682.
- when tenant restrains dispossession, 1683
  - rent, 1683.
- discretion of court not reviewed on appeal, 1684.
- when minors obtain injunction, 1684, n.
- counsel fees, 1685-1692.
  - general rule as to allowance of, 1685.
  - reason of the rule, 1686.
  - test as to allowance, 1686.
    - when dissolution not main relief sought, 1686, 1690.



THE REFERENCES ARE TO THE SECTIONS.

# **DAMAGES — *Continued.***

- where adjudication of title main relief, 1686.
- when no motion to dissolve made, 1686.
- when expense of action not increased by injunction, 1686.
- when court declines to interfere until final hearing, 1687.
- incurred for entire cause improper, 1688.
- where defendant has employed no counsel, 1688.
- regular counsel of municipality, 1688.
- employing unnecessary counsel, 1688.
- fees need not be actually paid, 1688.
- services must be rendered and evidence preserved, 1688.
- liability for, must be incurred, 1688.
- evidence of retainer, 1688.
- for attorney-general or public prosecutor, 1688, n.
- where construction of statute only question presented, 1688, n.
- after dissolution not allowed, 1689.
- for filing cross-bill, 1690.
- city enjoined from collecting taxes, 1691.
- interest of city attorney in bonds, 1691.
- not allowed when injunction expires by its own terms, 1692.
- contingent fee, 1692.

# **DANGER,**

- nature of, to warrant relief, 22.

# **DEATH,**

- effect of, on enjoining judgment, 136.
- of judgment creditor, effect of, 231.
- of defendant in injunction against judgment, effect of, 429.
- of complainant, practice, 1609.
- defendant, 1610.
- nominal parties, 1610.
- answer drawn up before, 1610.

# **DEBTOR (see CREDITOR),**

- not enjoined from disposing of property by creditor without judgment, 131, 326, 1334.
- can not enjoin judgment on ground of secret ante-nuptial contract, 1400.
- giving draft after injunction in pursuance of previous agreement, a contempt, 1432.

# **DECREE,**

- in equity, when not enjoined, 172.
- injunctions against, 270.

## THE REFERENCES ARE TO THE SECTIONS.

**DECREE** — *Continued.*

- for sale of realty, injunction against, 346.
- for purchase money, when not enjoined, 385.
- for injunction and reference in patent case, not final, 982.
- for account of assets of deceased debtor, practice in English and Irish courts, 1408, 1409.
- purchaser under, may be enjoined, although not a party, 1548.
- motion for writ, may be made at any time before, 1574.
- refusing relief on final hearing, a bar, 1586.
- interlocutory, not a bar, 1586.
- final, sureties can not go behind, 1641.
- necessary before action on bond can be maintained, 1649.

**DEDICATION,**

- of land to public use, sale enjoined, 328.
- of street, when unauthorized use enjoined, 589, 635.
  - as a highway, not a dedication to use of railway, 635.
- permission to publish novel founded on play not a, to the public, 1041.

**DEED** (see CONVEYANCE),

- loss of, no ground for injunction, 324.
- fraud in obtaining, ground for injunction, 364.
- void, no ground for enjoining ejectment, 415.

**DEEDS OF TRUST** (see MORTGAGES),

- forfeiture under, enjoined, 342.
- sale of homestead under, when not enjoined, 440.
- sale under, when not enjoined, 443.
  - not enjoined because of suit on notes, 444.
  - payment, ground for enjoining, 445.
  - when heirs necessary parties, 446.
  - when enjoined for mistake, 449.
  - insolvency of trustee, no ground for enjoining, 451.
  - want of notice by trustee, ground for, 451.
  - not enjoined, when debt due, 452.
    - because time unpropitious, 454.
  - by national bank, enjoined, 457.
  - purchaser seeking to enjoin, averments necessary, 460.
  - injunction against, when dissolved, 461.
  - not enjoined for failure of title, 474.
- securing usurious loans enjoined, 1116.
- injunction suspends statute of limitations, 1133.
- injunction against sale under power, no bar to executor's sale, 1373.
- injunction against sale under, dissolved on conveyance of outstanding title, 1544.
- damages for enjoining sale under, 1671.

## THE REFERENCES ARE TO THE SECTIONS.

## DEFAULT,

- judgments by, rarely enjoined, 277.
- when enjoined, 277.
- question of diligence, 278.
- against surety, on agreement not to execute, 1331.

## DEFENSE AT LAW. (See ACTIONS AT LAW; REMEDY AT LAW.)

## DEFINITION,

- of injunction generally, 1.
- mandatory injunction, 2.
- preventive injunction, 2.
- interlocutory injunction, 3.
- perpetual injunction, 3.
- common injunction, 6.
- special injunction, 6.

equitable waste, 680.

purpresture, 759.

trade mark, 1063.

## DELAY (see LACHES),

- of payment by trustees winding up corporation, 1195.

## DEMURRER,

- want of right of riparian owner to enjoy land ground for, 796.
- allegation of establishment of right at law no ground for, when enjoining construction of mill-dam, 840.
- avermment of compliance with statutory conditions for copyright, ground for, 990.
- admits poetical allegations of fact, 1157.
- motion to dissolve not heard pending, 1468.
- before answer operates as a, 1469.
- dissolution after judgment on, 1494.
- admits allegations on information and belief, 1571.
- lies for omission of prayer for injunction, 1573.
- in Illinois motion to dissolve operates as, 1706.
- amendment to bill after, allowed without prejudice, 1594.

## DEPOSIT,

- of money, in lieu of injunction to restrain production of play, 1052.
- change of savings into stock, 1212.

## DEVISEE,

- rights of, as against creditors and tenant, 339.
- under lost will, rights of, against heir, 362.

## DILIGENCE. (See ACQUIESCENCE; LACHES.)

## DIRECTORS (see CORPORATIONS).

- of bank, election not enjoined, 25.
- contracts by, with corporation, 1199.

## THE REFERENCES ARE TO THE SECTIONS.

DIRECTORS — *Continued.*

injunction in behalf of shareholder, 1203-1223.  
*ultra vires* acts of private corporation, 1224-1229.

elections of, 1230-1235.

whether proper defendants in bond litigation, 1297.

## DISCHARGE IN BANKRUPTCY. (See BANKRUPTCY.)

## DISCLOSURE. (See SECRETS.)

## DISCOVERY,

injunctions in aid of, dissolved after answer, 1522.

## DISCRETION,

in granting interlocutory injunction, 11.

not controlled by *mandamus*, 15.

in reviving injunction, 39.

of inferior court, when not interfered with, in trespass, 720.

in granting injunction against infringement of patent, 935.

of corporate bodies, rarely interfered with, 1186.

of municipal corporations, in the absence of fraud, not interfered with, 1240, 1252.

municipal improvements, 1270.

in punishment of contempt, rarely interfered with, 1458.

of inferior court, in dissolving injunction, 1467, 1508.

dissolving injunction rests in, 1508.

as to costs, in dissolving injunction against action at law, 1541.

rule of court requiring notice after answer, may be dispensed with, 1580.

continuance of motion to dissolve, matter of, 1611.

bond rests in, 1620.

of court, in awarding damages, not reviewed, 1684.

appeal from granting injunctions, 1693-1701.

dissolution of injunctions, 1702-1711.

## • DISMISSAL,

of bill, when not *res judicata*, 39.

of action, when enjoined, 85.

against principal to hold surety, 1382.

of proceedings for contempt for want of affidavit of service of injunction, no bar to subsequent proceedings, 1452.

of bill, works a dissolution, 1476.

how action should be brought by tax payers to avoid, 1560.

of bill, when cause not formally set for final hearing, 1618.

in Illinois, bill may be dismissed where injunction the only relief sought, 1706.

## DISSOLUTION,

of injunction against action, equity no further control, 88.

of injunction against judgment, 162.

## THE REFERENCES ARE TO THE SECTIONS.

DISSOLUTION — *Continued.*

- damages on, 163.
- effect of, 164.
- in bankruptcy, when, 286, 301, 303.
- restraining collection of purchase money, 403, 405, 406.
- restraining sale under deed of trust, 461.
- allowed when bounty tax legalized, 572, 1488.
- where answer admits past waste, injunction retained, 655.
- cutting timber by plaintiff after defendant enjoined, justifies, 679.
- of injunction against trespass, allowed on answer claiming title and showing solvency, 698.
- allowed when answer shows no title and denies equity of bill, 716.
- grounds of, in injunction against nuisance, 790.
- of injunction against opening sluices, allowed when loss resulting from can be repaired, 842.
- when patent right doubtful, but account of sale ordered, 938.
- bond given in lieu of injunction in patent cases, 968.
- injunction continued when answer denies validity of patent, to await trial at law, 970.
- injunction dissolved where defendant in patent suit licensed, 972.
  - proof necessary to secure, 978.
  - for delay in instituting action at law, 982.
  - on security to account, 982.
  - when contract not usurious, 1116.
  - when action brought for damages on contract in restraint of trade, 1182.
- of corporation, enjoined pending action to determine its liability, 1198.
- temporary injunction pending validity of election law dissolved, 1312.
- of partnership, need not be sought to obtain relief, 1330.
- injunction against partner dissolved when answer shows firm, 1339.
- of partnership, 1342-1349.
  - injunctions in connection with receivers of, 1350-1359.
- sale of interest of one partner on execution works a, 1352.
- statute giving law courts equitable jurisdiction no ground for, 1379.
- interlocutory injunction against husband dissolved when answer denies abandonment, 1394.
- injunction against sale of agent's property when principal's money not identified with, 1415.

THE REFERENCES ARE TO THE SECTIONS.

DISSOLUTION — *Continued.*

- proceedings for contempt, before and after, when injunction improperly granted, 1462.
- when party in contempt heard on motion, 1464.
- grounds of dissolution, 1467-1504.
  - general doctrine, 1467.
  - matter of discretion; terms, 1467.
- when motion entertained, 1468.
  - not entertained pending general demurrer, 1468.
  - where discovery bill contains no ground for, 1468.
  - where bill and affidavits make *prima facie* case, 1468.
- before answer, 1469.
  - when injunction irregular and plaintiff negligent, 1469, 1490.
  - where procrastination not wilful, 1469.
  - to amended bill, 1469.
  - want of equity in bill, 1469.
  - writ granted contrary to statute, 1469.
  - operates as a demurrer, 1469.
- burden and quantity of proof on motion, 1470.
  - effect of answer, 1470.
- failure to answer allegations of bill, 1471, 1473.
- answer must be clear and responsive, 1472.
  - new matter, 1472, 1481.
- where writ vague and indefinite, 1473.
- defective statement of case, 1473.
- incorporating scandalous matter in answer, 1473.
- deception and misrepresentation by plaintiff, 1474.
  - must have influenced court, 1474.
  - no bar to future application, 1474.
- plaintiff can not avail himself of answer, 1474.
  - question of, not considered on appeal, 1474.
- vague and general denial in answer insufficient, 1475.
  - general effect of denial considered, 1475.
- dismissal works dissolution, 1476.
  - on final hearing, 1476.
  - by defendant, 1476.
  - on dismissal of proceedings at law, 1476.
- railway enjoined from use of land until satisfaction of judgment when judgment reversed, 1476.
- effect of, on retention or dismissal of bill, 1477.

THE REFERENCES ARE TO THE SECTIONS.

DISSOLUTION — *Continued.*

- decree on motion to dissolve writ on injunction bill appealable from, 1477.
- when injunction may be made perpetual, 1478.
  - granted in aid of specific performance, 1479.
- laches or acquiescence of defendant a bar to, 1480.
  - where plaintiff misrepresents facts, 1480.
- effect of new matter in answer, 1472, 1481.
- technical errors in bill or order, 1482.
  - omission of prayer for writ in prayer for process, 1482.
- insufficiency of bond, time given to file new bond, 1482.
- denial of general charges of abuse of trust ground for, 1483.
- where facts improperly presented are of record, not allowed, 1484.
  - when apparent that writ is proper, 1484.
- bill improperly verified, 1484.
- effect of decree for payment of money, 1485.
- adding co-complainant by sole complainant, 1485.
- effect of security, 1486, 1497.
  - for costs, right to, not determined until final hearing, 1486.
- court may revive injunction, 1487, 1520.
  - when plaintiff estopped from second injunction, 1487.
- when tax legalized injunction dissolved, 1488.
  - bounty tax, 1488.
- irregularity in service no ground for, 1489.
  - sheriff's return conclusive, 1489.
  - in service of original motion, 1489.
- motion for, does not waive want of required notice of application, 1489.
- plaintiff's delay when bill shows necessity must amount to gross negligence, 1490.
- unsettled question of law, 1491.
- plaintiff may dismiss at any time, 1491.
- where, after answer, dispute remains, 1492.
- plea of statute of limitations, 1492.
- verification by one complainant sufficient, 1493.
- after judgment on demurrer, 1494.
- doctrine of relative convenience, 1495.
  - where continuance useless, 1495.
- act enjoined already performed, 1495.
- failure to give bond or verify bill, 1496.
- upon giving security, 1486, 1497.
  - matter of discretion; *mandamus*, 1497.

THE REFERENCES ARE TO THE SECTIONS.

DISSOLUTION — *Continued.*

- offer to return property; bond, 1498.
- account, where right doubtful, 1498.
- requiring plaintiff to submit to arbitration, 1498.
- when final decree disposes of property, 1499.
- cestui que trust* not heard, 1500.
- dissolution or perpetuation as *res judicata*, 1501.
  - by inferior court no bar to relief in superior court, 1501.
  - reversal of final injunction, effect of upon interlocutory, 1501, n.
- removal of cause to United States courts, 1502.
  - re-argument of motion in United States court, 1502.
- injunction granted until given day, 1503, 1520.
- court may compel plaintiff to set down cause for hearing, 1504.
- dissolution upon answer, 1505-1527.
  - answer so far as responsive taken as true, 1505.
  - denying equities of bill, 1505.
    - special plea, 1505.
    - character of denials, 1505.
    - unless peculiar circumstances exist, 1505.
    - denies allegations of fraud, 1506.
    - where no advantage taken in lower court of plea pending, 1506.
- denial upon information and belief, 1507, 1514.
  - administrator; where one with knowledge not made party, 1507.
- matter of sound judicial discretion, 1508.
  - upper court will not review action, 1508.
  - where auxiliary evidence of complainant's right exists, 1509.
  - where plaintiff will suffer irreparable injury, 1509.
    - removal of property, 1509.
- retained in cases of doubt, 1510.
  - when defendant not prejudiced, 1511.
    - disclaims any interest in property affected by creditor's bill, 1511.
    - shows interest in third person, 1511.
  - where relief the main object of the bill, 1512.



## THE REFERENCES ARE TO THE SECTIONS.

DISSOLUTION — *Continued.*

- when question involved novel, 1512.
- where question of fact evenly balanced, 1512.
- denial must be full and explicit, 1513.
- when answer does not deny plaintiff's title, 1513.
- denial must be on actual knowledge, 1514.
- in Alabama, motion entertained notwithstanding, 1514, n.
- matter not denied, taken as true, 1514.
- answer should show what is not actual knowledge, 1514.
- solicitor without knowledge, mere stranger, 1514.
- answer must be credible, responsive, verified, 1515.
- further requisites of, 1515.
- plaintiff's laches, when answer denies equities, 1516.
- when answer denies only part of bill, 1517.
- insufficient answer, 1518.
- injunction granted on bill, answer and affidavits, 1518.
- answer by corporation, 1519.
- injunction until coming in of answer, 1520.
- court may revive injunction, 1520.
- indictment for forgery upon answer, 1520.
- evasive answer of defendant, 1521.
- removal of property; insolvency, 1521.
- injunctions in aid of discovery, 1522.
- pendency of exceptions to answer, 1523.
- when court may adjust controversy, writ continued, 1524.
- when question of law doubtful, 1524.
- bill must be positive and within plaintiff's knowledge, 1525.
- want of probable cause, 1526.
- right supported by evidence to be used on final hearing, 1526.
- waiver of answer under oath, 1527.
- injunctions against several defendants, 1528-1535.
- dissolution refused until all have answered, 1528.
- modifications of the rule, 1529.
- plaintiff must have used diligence, 1529.
- answers of mere nominal defendants, 1529.
- when all having knowledge have answered, 1529, 1530.
- mere stakeholder, 1529.

THE REFERENCES ARE TO THE SECTIONS.

**DISSOLUTION** — *Continued.*

- must have been properly granted, 1529.
  - where one denies equities and others admit allegations, 1530.
  - where court satisfied from answer of one, 1530.
  - impossibility of procuring answer, 1531.
    - foreign corporation, 1531.
  - more strictness required in cases of fraud, 1532.
    - fraudulent relinquishment of trust, 1532.
    - denial by some of fraud as to themselves, 1532.
  - ignorance no ground for dissolution, 1533.
  - absence of defendant from state, 1533.
  - improper joinder of third party, 1533.
  - answer by corporation when officers have not answered, 1534.
  - defendants, against whom writ dissolved, may procure dissolution as to others, 1534.
  - when equities not denied, dissolution refused, 1535.
- injunctions** against proceedings at law, 1536-1541.
  - effect of dissolution on execution creditor, 1536.
    - appeal from decree, 1536.
  - failure to make defense at law, 1537.
    - complainant's right rests in trust, 1537.
    - where subject is of equitable jurisdiction, 1537.
  - against judgments may be retained in part, 1538.
    - when answer admits part payment, 1538.
  - under English practice, court may dissolve as to some of defendants, 1538.
  - where answer allows credit for amount of judgment claimed to be excessive, 1539.
  - admitting credits by answer, 1539.
  - refusal to answer admits allegations, 1540.
  - judgment discharged by bankruptcy, 1540.
  - error to enter decree for amount of judgment on dissolution, 1541.
  - when some judgments paid and others not, discretion as to costs, 1541.
- injunctions** affecting realty, 1542-1546.
  - diligence in advancing suit required, 1542.
  - long acquiescence in alleged acts of fraud, 1542.
    - in exercise of acts of ownership, 1542.
  - retained in cases of doubt, 1543.
    - as to whether property subject to sale on execution, 1543.

THE REFERENCES ARE TO THE SECTIONS.

**DISSOLUTION** — *Continued.*

- against judgment for unpaid purchase money, 1544.
  - defendants must have good title, 1544.
  - conveyance from third party, 1544.
  - may be required to produce title, 1544.
  - conveyance of outstanding title, 1544.
  - tender of conveyance necessary, 1544.
  - when purchaser has covenants, injunction not made perpetual, 1545.
- against railway to prevent illegal taking, 1546.
- general denial of fraud in defendant's title insufficient, 1546.
- omission of corporation, when members are joined, not a ground for, 1564.
- failure to file bill, 1583.
- demurrer sustained to original bill and amended bill not yet filed, 1583.
- answer under oath may be used as affidavit, 1587.
- existing writ not dissolved on hearing of another motion, 1590.
- bill may be amended after motion for, 1592.
- amendment after, 1593.
- allowed on previous motion when amendment is a new bill, 1595.
- practice in dissolving injunctions, 1599-1618.
- of the injunction bond, 1619-1634.
- sureties to injunction bond, 1635-1647.
- right of action on, 1648-1656.
- assessment of damages on, 1657-1662.
- damages on, 1663-1684.
- counsel fees on, 1685-1692.
- appeals from, of interlocutory injunctions, 1702-1711.

**DIVIDENDS,**

- payment of, by foreign corporation, 1190.
  - illegal, enjoined, 1217.
- acceptance of, not a ratification of fraudulent issue, 1231.

**DIVORCE,**

- injunction pending proceedings for, 1393.
  - extent of, 1395.
- agreement not to institute proceeding for, 1398.
- separation deeds, 1399.

**DOWER,**

- injunction denied pending proceedings for, 337.
- failure to procure release of, ground for enjoining judgment for purchase money, 403.

THE REFERENCES ARE TO THE SECTIONS.

**DOWER** — *Continued.*

easements appurtenant to, protected, 857.  
suit for, not enjoined, 1401.

**DRAFT.** (See PROMISSORY NOTES.)

**DRAMATIC COMPOSITIONS.** (See COPYRIGHT.)

**DURESS,**

in obtaining note, ground for injunction, 1123.

## E.

**EASEMENTS,**

leading principles, 848-858.

jurisdiction analogous to that in nuisance, 848.

irreparable injury must be shown, 848.

general rule stated, 849.

violation of covenant regulating use of land sold, enjoined, 849, 851.

prescriptive right protected, 849.

must have been exclusive, 849.

acquiescence a bar, 849.

must be certain, and violation of right clear, 850.

erection of wharf, 850.

buildings, 850.

right to lateral support protected, 753, 852.

injury to party wall, 852.

working of mines, 852.

drains conducting water against wall, 852.

right of burial in church yard, injunction refused

against removal of remains, 853.

action of trespass when defense legal and equitable,

not enjoined, 854.

lot owners may enjoin building in public square, 855.

town hall, 855.

injunction retained, when land used by public, 855.

lot owner can not enjoin leasing of ground conveyed for erection of public building, 855.

erection of school house upon ground dedicated to school purposes, not enjoined, 856.

appurtenant to dower property, protected, 857.

interference should be unreasonable and vexatious, 858.

removal of signs not enjoined, 858.

in light, 859-869.

general rule for protection of, 869.

material injury to comfort necessary, 859, 861.

## THE REFERENCES ARE TO THE SECTIONS.

EASEMENTS — *Continued.*

- relief against malicious erection under statute, 859, n.
- when injury substantial mandatory injunction granted, 860.
- must be a substantial injury to present business, 861.
  - when substantial damages allowed at law, relief granted, 861.
  - effect of covenant for quiet enjoyment, 862, n.
- prescriptive right protected, 862.
- right to be determined between owners of dominant and servient estate, 862.
- re-building of house enjoined, 862.
  - even though windows enlarged, 863.
- when alteration of premises changes servitude, relief refused, 863.
- tenant from year to year protected, 864.
- lessor can not restrain lessee when injury not irreparable, 864.
- when relative convenience balanced, 865.
  - defendant ordered to abide result of hearing, 865.
  - given liberty to apply to court, 865.
- erection of house injuring prospect, 866.
- relief refused when right doubtful, 866.
  - mere opinions not sufficient, 866.
- effect of plaintiff's delay, 867.
  - promises of defendant to remove, 867.
- prescriptive right denied in United States, 868.
- erection of building over canal enjoined, 868.
- title derived from common source, relief refused in absence of covenant, 869.
- in water, 870-885.
  - protected, 870.
  - mills on both sides of stream, 870.
  - right must be established, 870, 881.
  - evidence must be clear to warrant final injunction, 870.
  - mere licensee can not enjoin, 870.
  - mill-owners protected, 870 a.
  - prescriptive right protected, 871.
  - acquiescence a bar to relief, 871.
  - doctrine of prescription in cases of mills, 872.
    - illustrations, 872.
  - clear violation of right, sufficient ground, 873.
    - purchaser entitled to same use as grantor had, 873.

## THE REFERENCES ARE TO THE SECTIONS.

EASEMENTS — *Continued.*

- two mills upon same stream, respective rights protected, 873.
- right below does not authorize drawing off above, 873.
- relief liberally exercised in cases of mills, 874.
- purchaser of mill enjoined from running additional machinery, 874.
- injuring reservoir supplying mill enjoined, 874.
- diversion of creek from mill by railway enjoined, 874.
- drawing off waters of lake enjoined, 874.
- closing basin connected with public canal not enjoined, 874.
- detention of water from factory enjoined, 875.
- injury by well to other well or spring not enjoined, 801, 876.
- drainage of water flowing in well defined channel enjoined, 876.
- mining ditch constructed when land unlocated protected, 877.
- when mining company solvent, not enjoined, 877.
- filling ditch, draining surface water enjoined, 877.
- drawing off water from river not enjoined, 877.
- premises burdened with servitude of supplying other premises, 878, 879.
- mill owners in severalty may join to restrain diversion of water, 880.
- obstruction to mill-stream must be shown to be unlawful, 881.
- equity will not adjust respective rights of parties, 881.
- can not interfere with canal company, 882.
- injunction not issued to compel legal relief, 883.
  - restrain lessees from unauthorized use of, 883.
- acquiescence a bar, 884.
  - compensation for twenty years, present insolvency no ground, 884.
- further illustrations of relief barred by acquiescence, 885.
- in rights of way, 886–896 *b*.
  - relief granted against obstructions to, 886.
    - ground of irreparable injury, 886.
    - facts showing must be stated, 886.
    - clear right should be shown, 886.

## THE REFERENCES ARE TO THE SECTIONS.

**EASEMENTS** — *Continued.*

- when injury not irreparable, relief refused pending action at law, 887.
- relief when action at law for damages not instituted, 887.
- when right undoubted, and obstruction to right clear, relief granted, 887.
- right by prescription protected, 888.
- verbal license, 889.
- to stable protected, 890.
- joint act of several, 890.
- representations of grantor operate as an estoppel, 891.
- alley between adjoining lots, 891.
- right in alley protected, 892.
- defendant claiming under void tax sale, 892.
- change of avenues in cemetery enjoined, 893.
- purchaser with notice bound, 894.
- obstruction to tow-path enjoined, 894.
- right reserved protected against grantor's heirs, 895.
- non-user no bar, when right resumed before acts complained of, 895.
- when injunction made mandatory, 896.
- obstructing passage-way under railroad, 896 *a*.
- passage through rooms; stairway, 896 *b*.
- test as to proper parties to enjoin violation of public, 1553.

**ECCLESIASTICAL MATTERS,****injunctions in, 304-322.**

- jurisdiction founded in trust, 304.
- use of church property in violation of trust enjoined, 305.
- relief dependent upon title, 306.
- distinction between ecclesiastical and corporate nature of society, 307.
- separation from church, when not departure from trust, 307.
- equity devoid of ecclesiastical jurisdiction, 308.
  - will not interfere with excommunication of members, 308.
  - will not revise proceedings of ecclesiastical tribunals, 309, 310.
- trial of minister not enjoined, 310.
- decision of church judicatory, when final, 310.
- injunction against deposed clergyman, 311.

THE REFERENCES ARE TO THE SECTIONS.

**ECCLESIASTICAL MATTERS — *Continued.***

- rightful pastor not enjoined, 312.
- removal of minister not enjoined, 313.
- misconduct of trustees, ground for relief, 314.
- officers of church, when enjoined, 314.
- trustees not enjoined from sale of church property, 315.
- intrusion by trustees upon functions of minister, 315.
- dismantling church, 315.
- deposed agent enjoined from interfering, 315.
- heirs enjoined from interfering with property dedicated to church and burial ground, 316, 328.
- trustees proper parties to bill, 316, 1558.
- extent to which equity will investigate doctrinal points, 317.
- relief as between two religious bodies holding property in trust, 318.
- injunction not allowed against trespass, 319.
- burial of dead not enjoined, 319.
- diversion to school purposes enjoined, 320.
- Sunday school enjoined, 320.
- trustees not enjoined from rebuilding, 321.
- receiver of church property protected, 322.
- disinterment of bodies enjoined, 351, 703, 1558.
- interference with church property enjoined, 714, 1558.
- particular church worship secured by contract, 1114.

**EJECTMENT,**

- when enjoined to prevent multiplicity of suits, 61.
- bill to consolidate actions of, injunction refused, 62.
- injunctions against, when allowed, 95-97.
- effect of, on right to enjoin collection of purchase money, 389.
- injunctions concerning, 414-429.
  - equity averse to interfering with, 414.
  - not enjoined when questions may be determined at law, 415.
  - void deed, no ground for enjoining, 415.
  - for non-payment of rent, relief doubtful, 416.
  - payment of rent not enjoined, pending, 416.
  - estoppel of plaintiff in ejectment, injunction allowed, 417.
  - fraud of plaintiff, ground for relief, 418.
  - enjoined when equity has prior jurisdiction of controversy, 419.



THE REFERENCES ARE TO THE SECTIONS.

**EJECTMENT** — *Continued.*

- enjoined to prevent cloud upon title, 420.
- mistake as ground for enjoining, 421.
- injunction allowed to prevent multiplicity of suits, 422.
- refusal of infant to ratify sale, ejectment not enjoined, 423.
- not enjoined because of statute of limitations, 424.
- bill to redeem, injunction made perpetual, 425.
- judgment in, by mortgagee, not enjoined before hearing, 425.
- parties entitled to the relief, 426.
- when landlord refused relief, 426.
- when tenant may enjoin writ of possession, 427.
- removal of crops, when not enjoined, 427.
- when plaintiff permitted to proceed to judgment, 428.
- defendant not enjoined from setting up outstanding term, 428.
- death of defendant before answer, 429.
- when enjoined because of mistake, 466.
- when owner of right of way can sue in, injunction denied, 630.
- pending action of, ordinary agricultural use of land not prohibited, 654.
- plaintiffs in, may enjoin destruction of timber, 677.
- cutting by plaintiff after injunction justifies dissolution, 679.
- remedy by, when buildings erected on complainant's land, 707, 708.
- by heirs, when power defectively exercised, enjoined, 1362.
- general denial of fraud in defendant's title insufficient, 1546.

**ELECTION,**

- to vote municipal tax, not enjoined, 555.
- want of notice of, to vote municipal-aid tax, tax enjoined, 562.
- properly held, tax voted not enjoined, 565.
- to membership in corporation, 1193.
- of private corporations, 1230-1235.
- to municipal office, not inquired into, 1243, 1250.
- injunction against canvassing board void, 1250.
- removal of county seat, 1257, 1258.
- preliminary for issuing aid bonds, 1284.
  - validity of, determined by court, 1285.
  - holding of, not enjoined, 1286.
- title to public office not determined in equity, 1312.
- holding of, can equity enjoin, 1316, 1425.

**EMBLEMENTS,**

- removal not enjoined pending action for vendor's lien, 331.

THE REFERENCES ARE TO THE SECTIONS.

**ENTIRETIES,**

estate by, not subject to execution for husband's debts, 1387.

**EQUALIZATION.** (See **TAXES.**)**EQUITY OF REDEMPTION,**

mortgagee enjoined from selling, 450.

in mortgaged chattels, sale enjoined, 468.

**ERRORS.** (See **RELEASE.**)**ESTOPPEL,**

of plaintiff in ejectment, injunction allowed, 417.

when a bar to injunction against municipal assessments, 549.

exception to doctrine, 550.

bars injunction against municipal-aid tax, 564.

construction of railway, 618.

representations of grantor operate as, 891.

on sale of newspaper, bar relief against breach  
of covenant, 1181.

against shareholder, 1212.

shareholder receiving benefit of act *ultra vires*, 1229.

bidding for contract to build ditch not an, 1271.

tax payer who has issued bonds, 1288.

consent to violation of an injunction, 1437.

obligor estopped where bond granted "on usual terms," 1627.

of surety in injunction bond, 1637.

**ESTOVERS,**

use of, when enjoined, 437.

**EVIDENCE,**

newly discovered as ground for enjoining judgment, 115-117.

effect of scientific, on question of nuisance, 774, n.

must be clear, to warrant final injunction against injury to  
easement in water, 870.

written, of franchise, rule relating to, 909.

clerk's certificate of deposit of title page, *prima facie*, 1044.

of deception of public by trade mark, burden on plaintiff, 1086.

statutory, of conditions for issuance of aid bonds not reviewed,  
1285.

effect of answer as, on motion to dissolve, 1470.

any legal, showing that relief should not be granted, admissi-  
ble, 1577.admissibility of, on motion to dissolve injunction in patent case,  
1606.

on hearing of contempt proceedings; 1459.

parol, inadmissible to contradict injunction bond, 1638.

**EXCEPTIONS,**

to answer, no objection to dissolution, 1602.

THE REFERENCES ARE TO THE SECTIONS.

# EXECUTIONS (see JUDGMENTS),

- against third persons, sale under, when enjoined, 367-371.
- sale of interest of partner on a dissolution, 1352.
- against administrator, when enjoined, 1365.
- sale of legacies under, against legatee, enjoined, 1374.
- agreement not to take out, against surety, relief refused, 1381.
- injunction against sale under, when conditions not complied with, 1429.
- officer selling under, after notice of writ, trespasser *ab initio*, 1444.
- levy, by plaintiff in, attachment, proper remedy for, 1463.
- effect of dissolution against enforcement of, appeal, 1536.
- when liability of land to sale under, doubtful, writ retained, 1543.
- when officers of court proper parties in bill to enjoin sale, 1551.
- when sale of specific articles enjoined, liability on bond, 1623, 1639.
- on final decree, not a necessary condition to suit on bond, 1649.
- damages on injunctions affecting sale of real estate, 1674.
- appeal from dissolution does not prevent enforcement of, 1709.

# EXECUTORS (see ADMINISTRATORS AND EXECUTORS),

- not enjoined on general charges, 25.
- when enjoined from levying execution, 339.
- of law reporter, denied injunction under renewal, 1058.
- enjoined from use of firm name, 1345.

# EXEMPTION,

- from execution, as ground for injunction, 122.
- from taxation, as ground for injunction, 530-535.

# EXHIBIT,

- transcript of judgment should be annexed as, 1572.

# EXPRESS COMPANIES,

- injunction refused to compel railroad facilities, 621 *b*.

## F.

# FACTORS,

- denied relief against sale of property consigned to, 120.

# FEDERAL COURTS. (See COURTS.)

# FENCES,

- removal of, enjoined when street fenced for thirty years, 584.
- wooden, erection of, not enjoined, 706.

# FERRIES,

- franchise in, 927-933.
- after injunction against, running boat by president a violation, 1427.

THE REFERENCES ARE TO THE SECTIONS.

FINAL INJUNCTION. (See PERPETUAL INJUNCTION.)

FINES,

for non-payment of municipal tax, not enjoined, 553.

violation of ordinances not enjoined, 1244.

injunction, division between state and injured

party improper, 1457.

FIXTURES,

injunction against removal of, its effect, 353.

when allowed, 433.

from mortgaged premises, 481.

FORCIBLE ENTRY AND DETAINER,

want of title no ground for enjoining, 89.

injunctions against, 98.

judgment in, not interfered with, 260.

action of not enjoined for want of title, 325.

writ of restitution not enjoined, 340.

when trespass not enjoined, 712.

execution in, for wife's property, not enjoined because wife  
not a party, 1388.

FORECLOSURE (see MORTGAGES),

enjoined when mortgage paid, 99.

in foreign country, when enjoined, 105.

not enjoined because of judgment in foreign country, 254.

injunctions concerning, 442-461.

attorney's fees proper as damages for restraining sale under,  
1671.

FOREIGN COURTS,

suits in, when enjoined, 103-107.

jurisdiction of English Chancery in enjoining, 103,  
104.

same of Irish Chancery, 104.

property in foreign country no bar to relief, 105.

foreclosure, when enjoined, 105.

relative convenience considered, 105.

American doctrine as to suits in other states, 106.

FOREIGN SOVEREIGN,

entitled to injunction, 27.

FOREIGN STATE,

persons and property in, relief refused, 33.

judgments of, injunctions against, 269.

FORFEITURE,

in deed of trust, enjoined, 342.

when action at law enjoined to prevent, 1110.

## THE REFERENCES ARE TO THE SECTIONS.

## FRANCHISE,

- created by United States, state officer enjoined from destroying, 110, 906.
- of corporation, when taxation of not enjoined, 493, 906.
  - when enjoined, 506, 906.
- tax upon not enjoined, 520.
- exercise of, not enjoined when remedy at law, 595.
- nature and grounds of the relief, 897-911.
  - general doctrine, 897.
  - establishing right at law, 898.
    - special right necessary to enjoin, 898.
  - jurisdiction akin to that in nuisance, 899.
  - water company protected, 899.
  - right must be coupled with possession, 900.
  - negligence a bar to relief, 900.
  - exclusiveness of grant formerly presumed, 901.
- later doctrine; grant strictly construed, 902.
  - exclusiveness of, must be expressed, 902.
    - railway may run through same valley with canal, 902.
    - street railway denied relief, 902.
- exclusive right to fishing protected, 903.
- where penalty secures an exclusive right, patentee can not enjoin, 904.
- right granted boom company considered public, 905.
- riparian owner can not enjoin, 905.
- obstruction to navigation of river not enjoined, 905.
- United States courts enjoin destruction of United States franchise, 906.
  - tax against, when not enjoined, 906.
    - when enjoined, 906.
- when franchise fraudulently usurped, stockholders may have relief, 907.
- when no private right involved, *quo warranto* proper remedy, 907.
- commissioners to carry out lottery may protect it, 908.
  - state not necessary party, 908.
- written evidence of, must be produced, 909.
  - or satisfactory excuse given, 909.
- to navigate river, rules governing courts, 910.
- distinction between monopoly and, 911.
  - monopoly to gas company not protected, 911.
- roads and railways, 912-916.

THE REFERENCES ARE TO THE SECTIONS.

FRANCHISE — *Continued.*

- franchise in road protected, 912.
  - rival road, 912, 914.
  - destruction of toll gate, 912.
- inadequacy of remedy at law a test, 912.
- diligence required, 913.
- actual injury must exist, 914.
- exclusive railroad franchise between terminal points protected, 914.
  - consolidation not enjoined, 914.
- right must be exclusive, 915.
- rival street railways, 916.
- unauthorized extension of track enjoined, 916.
- coach company enjoined from using street railway, 916.
- bridges, 917-926.
- general rule, 917.
- legislative grant sufficient establishment of right, 918.
  - exclusive right protected, 918.
- jurisdiction not dependent upon defendant's profits, 919.
  - crossing railway bridge free of toll enjoined, 919.
- relief allowed between landlord and tenant, 920.
- when legal right doubtful, convenience considered, 921, 924.
  - conveyance of passengers across river by railway, 921.
  - may require an account, 921.
  - leave given to apply again for injunction, 921.
- negligence bars relief, 922.
  - building of locks by second company, 922.
- right must be exclusive, 923.
  - when not, second not enjoined, 923.
  - appropriation of, to railway, 923.
- right to erect toll-bridge protected, 925.
  - compliance with conditions constitutes contract, 925.
- acquiescence a bar to relief, 926.
- ferries, 927-933.
  - exclusive right to maintain protected, 927.
    - erection of bridge, 927.
  - remedy at law a bar, 928.
  - relief granted when amended bill shows, 928.
  - negligence a bar, 929.
  - use of boats by private persons not enjoined, 930.
  - protection extended to land necessary to enjoyment of, 931.
  - rival ferries on river between two states, 932.
  - county enjoined from building rival ferry, without condemning, 933.

## THE REFERENCES ARE TO THE SECTIONS.

**FRAUD,**

- not defined by courts, 21.
- specific allegations necessary, 21.
- ground for enjoining actions at law, 47.
  - judgment, 115.
- allegations of, on information, judgment not enjoined, 118.
- judgments obtained through, 190-208.
  - may be enjoined, 190.
  - by consent, enjoined, 191.
  - fraudulent assurances from opposing party, 191.
  - fraudulent alteration of records, 192.
  - fraud in obtaining bill of sale, 192.
  - when fraud can not be urged at law, 193.
  - diligence necessary, 194.
  - fraud construed under statute, 195.
  - parties to the proceeding, 195.
  - violation of agreement, 196.
  - forged assignment of bond, 197.
  - on forthcoming bond, 198.
  - sale under collusive judgment, 198.
  - judgment once discharged, 198.
  - defense prevented by fraud, 199, 200.
  - agreements for payment, 201.
  - fraud as to surety of note, 201.
  - fraud by attorney, ground for relief, 202.
  - fraud may consist in silence, 203.
  - satisfactory proof required, 204.
  - plaintiff must come into court with clean hands, 205.
  - deceit in sale of medicinal compound, 206.
  - effect of final injunction, 207.
  - execution on vacated judgment enjoined, 208.
- fraudulent purchase at sheriff's sale, 361.
- in obtaining deeds, ground for injunction, 364.
- ground for enjoining collection of purchase money, 383.
  - judgment in ejectment, 418.
  - taxes, 500.
- in obtaining aid tax, tax enjoined, 563.
- cutting of timber when fraudulently conveyed enjoined, 729.
- ground for enjoining pirated trade mark, 1068, 1069, 1085.
  - fraudulent intent need not be shown, 1087.
- by plaintiff in trade mark, 1092, 1094.
- in obtaining contract a ground for relief, 1108, 1123, 1126.
- sub-lessee may compel compliance with surrendered lease, 1147.
- on part of corporation, must be positively averred and sworn to, 1184.

THE REFERENCES ARE TO THE SECTIONS.

**FRAUD** — *Continued.*

- in organization of railway not considered, 1188.
- fraudulent issue of stock by directors to control election, 1231.
- not sufficient ground to determine title to corporate office, 1235.
- ground for interfering with discretion of municipality, 1240.
  - in making improvements, 1270.
- an irreparable injury by public officers, ground for relief, 1311.
- by executor or administrator as ground for relief, 1366.
- injunctions in behalf of creditors, 1402-1415.
- where charged against several, greater strictness required in answer, 1532.
- acquiescence in, ground for dissolution of injunction affecting realty, 1542.
- general denial of, in defendant's title, insufficient, 1546.
- ground for making officers of court parties to bill to enjoin sale, 1551.
- judgment recovered against school district through, tax for enjoined, 1557.
- in execution of bond in New York can only be shown in action on bond, 1644.
  - vitiates assessment of damages, 1644.

**FRUIT TREES,**

- removal by vendor enjoined, 343.
- cutting enjoined, 676, 702, 727.

**G.****GAMING CONTRACTS,**

- actions on, enjoined, 70, 1127.
- judgment on, enjoined, 224, 235, 1115.
- defense at law, 236.

**GARNISHEE,**

- injunctions against, 86.
- protected against judgment paid, 123.
- effect of release of lands under judgment, 258.
- proceedings, when enjoined, 263.
  - against purchaser, when ground for enjoining collection of purchase money, 399.

**GARNISHMENT,**

- sale pending, when enjoined, 119.

**GAS COMPANY,**

- unauthorized use of streets by, enjoined, 597 *b*.
- monopoly of, when protected, 911.
- protected by injunction against city, 1281 *a*.



## THE REFERENCES ARE TO THE SECTIONS.

## GAS WORKS,

monopoly of, not protected, 911.

repealing ordinance giving rights to, not enjoined, 1246.

## GOOD-WILL,

judgment for price of, when not enjoined, 160.

no restrictive covenant implied on sale of, 1169.

sale of, 1345.

## GRANTEE,

of heirs of real property may enjoin sale when personal property sufficient, 1367.

## GUARDIAN,

judgment for or against, when enjoined, 152.

## H.

## HABEAS CORPUS,

proceedings under, to test attachment, jurisdiction only considered, 1430.

## HEIRS,

contest with devisee under lost will, 100, 362.

proceeding by, to determine dower, injunction denied, 337.

rights of, as against purchaser at administrator's sale, 337.

as against judgment creditors, 339.

when restrained in ejectment, 418, 419.

when necessary parties to suit to enjoin sale under deed of trust, 446.

enjoined from injury to right reserved by grantor, 895.

ejectment by, when power defectively executed, enjoined, 1362.

entitled to relief against executors, 1367.

grantee of, when personal property sufficient, 1367.

## HEIRLOOMS,

levy on not enjoined, 141.

## HIGHWAYS (see STREETS),

when relief by appeal or error from irregularities, injunction refused, 579.

contract with city bars relief, 581.

action of legal tribunal not impeached collaterally, 592.

tender of damage a bar to relief, 585.

municipal control of, rarely enjoined, 587, 588.

pending action to determine right to open, injunction allowed, 590.

when apprehensions of future injury insufficient, 591.

unauthorized opening of, enjoined, 592, 1318.

court may award damages as an incident, 592.

## THE REFERENCES ARE TO THE SECTIONS.

**HIGHWAYS** — *Continued.*

- discretion of municipal authorities not interfered with, 593.
- pending action to determine right to close, injunction allowed, 596.
- opening of, when enjoined, 596.
- nuisances to streets and, 816-825.
- franchises in roads and railways, 912-916.
- discretion of commissioners of, not interfered with, 1311.

**HOMESTEAD,**

- of bankrupt, sale not enjoined, 288.
- injunctions concerning, 438-441.
- sale of, under execution, when enjoined, 438.
  - when not enjoined, 439.
  - not enjoined when occupancy has ceased, 440.
  - sale under prior lien not enjoined, 440.
  - deed of trust, sale under not enjoined, 440.
- assignment of to wife by partner, when not enjoined, 440.
- rights under "Homestead Act" protected, 441.
- of mortgagor, sale of under foreclosure not enjoined, 450.
- tax on, when not enjoined, 523.

**HUSBAND AND WIFE,**

- of injunctions between, 1387-1401.
  - sale of wife's property for husband's debts enjoined, 1387.
  - labor of wife and minor children, 1387.
  - omission of husband no ground for dissolution, 1387.
  - where rights between are equitable, sale at law enjoined, 1387.
  - estate by entireties not subject to execution, 1387.
- purchase of mortgage of wife by judgment creditors of husband, 1388.
- where wife's title disputed relief refused, 1389.
- husband can not complain if wife does not, 1388.
- sale of property in void replevin suit by husband enjoined, 1389.
- title in husband and purchase money paid by him, 1390.
- on bill to charge wife's estate, incumbrance of same enjoined, 1391.
- exemption of wife's estate by statute, 1392.
- where no proceedings instituted by husband, 1392.
- husband as administrator can not enjoin sale of wife's property under trust deed, 1392.
- proceedings for divorce; alimony, 1393.
- apprehensions of abandonment insufficient, 1394.
  - preliminary, dissolved when answer denies, 1394.

THE REFERENCES ARE TO THE SECTIONS.

**HUSBAND AND WIFE** — *Continued.*

- injunction in divorce may restrain incumbrance as well as sale, 1395.
- use of husband's property not enjoined; tools, 1395.
- error to perpetually enjoin sale to secure alimony, 1395.
  - collection of choses in action, 1396.
  - alimony should be made a lien, 1396.
- partnership real estate claimed by wife, 1397.
- action for goods sold wife when bill shows defense at law, 1398.
- agreement not to institute divorce suit, 1398.
  - to give wife control of children, 1398.
- removal of child from country, 1398.
- marriage of infant, 1398.
- separation deeds, 1399.
- debtor can not enjoin judgment on ground of secret ante-nuptial contract, 1400.
- dower, suit for, not enjoined, 1401.

**I.****IGNORANCE,**

- ground for enjoining judgments, 209.
- of fact and law, distinguished, 219.
- of law, judgment not enjoined, 219.
- of fact, judgment enjoined, 220.
- of counsel, no ground for relief, 221.
- false return of service by sheriff, 222.
- caused through negligence, 222.
- of assignee of note, effect on judgment, 223.
- of set-off, ground for enjoining judgment, 241.
- of surety of defense at law, without diligence no ground for relief, 1383.

**ILL-FAME,**

- houses of, enjoined, 782.

**INDEMNITY BOND,**

- suit on, when enjoined, 47.
- when taken in lieu of injunction, 968, 1497.

**INDIAN LANDS,**

- tax on, enjoined when exempt, 532.

**INDORSER.** (See PROMISSORY NOTES.)**INFANTS,**

- different suits in behalf of, one enjoined, 74.
- ejectment after attaining majority, not enjoined, 423.
- improper marriage of, enjoined, 1398.

**INFORMATION,**

- by attorney-general, requisites of, 1570.

## THE REFERENCES ARE TO THE SECTIONS.

## INJUNCTION BOND (see DAMAGES),

- necessary to restrain payment of money on levy, 159.
- judgment on, not enjoined, 161.
- injunction against tax not reversed for insufficiency, 519.
- judgment on note does not merge in judgment on, 1384.
- failure to approve security no ground for dissolution, 1608.
- of the bond, 1619-1634.
- object of, 1619.
- required by statute, error to dispense with, 1620.
  - subsequent statute can not affect, 1620.
- rests in discretion of court, 1620.
- when right clear and infraction established none necessary, 1620.
- order ineffectual until bond given, 1621.
- when through mistake injunction takes effect before, 1621.
- when operative, 1621.
- extends to all defendants, 1621.
- insufficiency or irregularity of the, 1622.
- liability on, when judgment enjoined, 1623, 1639.
  - sale of specific article enjoined, 1623, 1639.
- consideration of, 1624.
- when merits of original action considered, 1624.
- pendency of second suit against same judgment, 1625.
- enjoined in equity although no defense at law, 1625.
- additional security, 1626.
- substitution of new for old, 1626.
- mistake of clerk in entry of order, 1626.
- error to perpetuate writ on condition of new, within certain time, 1626.
- granted "on usual terms," 1627.
- obligor estopped to deny compliance with order, 1627.
- statutes prohibiting relief against judgments, construed, 1628.
- given in confederate states, 1629.
- failure to specify particular sum, 1630.
- delivery of, for prosecution, order not rescinded except for cause, 1631.
- when enforced in equity, proper distribution made, 1632.
- on appeal by principal alone, validity of not considered, 1633.
- approval of court may be indorsed on, 1634.
- name of surety omitted from body of, 1634.
- obligor executing in capacity of trustee, 1634.
- sureties, 1635-1647.
  - liability of, strictly construed, 1635.
    - where injunction against two, retained against one, 1635.

THE REFERENCES ARE TO THE SECTIONS.

INJUNCTION BOND — *Continued.*

- costs incurred on appeal by defendant, 1636.
- by plaintiff, 1636.
- when writ continues during appeal, 1636.
- "this court" means "the court," 1636, n.
- when bond taken against damages and costs, but not against judgment, 1636.
- estopped from showing writ not granted, 1637.
- contra*, 1624, n.
- satisfaction of judgment before final decree, 1637.
- liable when principal dies and cause revived, 1637.
- solvency of principal no defense, 1637.
- parol evidence inadmissible, 1638.
- misrecital in bond, 1638.
- liability when judgment enjoined, 1623, 1639.
- sale of specific article enjoined, 1623, 1639.
- entitled to stand on precise terms of contract, 1640.
- no averment of award of damages against principal, 1640.
- recovery against principal for wrongful suing out of writ, 1640.
- can not go behind final decree, 1641.
- parties can not affect liability of, by stipulation, 1641.
- remedy against, is by action at law on the bond, 1642.
- Louisiana practice, 1643.
- issue of execution against, when no award of damages against, 1643.
- concluded by reference under New York practice, 1644.
- fraud in execution of bond can only be shown in action on, 1644.
- fraud vitiates assessment of damages, 1644.
- concluded by assessment of damages against principal, 1645.
- not liable for personal property wasted by receiver, 1646.
- right of, to appeal, 1647.
- principal may be surety in appeal bond, 1647.

THE REFERENCES ARE TO THE SECTIONS.

INJUNCTION BOND — *Continued.*

right of action, 1648-1656.

common law remedy not merged in remedy upon bond,  
1648.

necessary allegations, 1648.

when it accrues, 1649.

execution upon final decree unnecessary, 1649.

all obligees may sue, 1649.

final decree necessary, 1649.

injunction against disposal of property *pendente lite*, when action at law undetermined,  
1649.

partial dissolution sufficient, 1649.

dismissal of action sufficient, 1649 *a.*

effect of defendant's death, 1649 *a.*

injunction must actually issue, 1650.

error to decree damages against complainant for failure  
to file bond, 1650.

prosecuting action with effect, 1650.

when cause of action removed, 1650.

discontinuance of action by agreement, 1650.

injunction against judgment, 1651.

on final dissolution enforcement of judgment,  
first, unnecessary, 1651.

subsequent reversal as to one debtor, 1651.

reinstatement of injunction, 1651.

satisfying, by taking debtor in execution, 1651.

no inquiry allowed into merits of injunction, 1652.

dissolution *prima facie* evidence of wrongful  
issue; bond inures to all defendants, 1652, *n.*

want of jurisdiction in court or officer granting the  
writ, 1652.

sufficient averment of breach, 1653.

disobedience to writ no defense to action, 1654.

court will declare bond forfeited when imposed upon,  
1655.

doctrine of federal courts as to fixing condition of  
bond, 1656.

dissolution does not give right of action on,  
1656.

assessment of damages, 1657-1662.

practice divergent, 1657.

in absence of statute, equity will not award damages in  
original cause, 1657.

THE REFERENCES ARE TO THE SECTIONS.

# INJUNCTION BOND — *Continued.*

New York practice, 1658.

court may direct manner of proof, 1658.

order is matter of right, 1658.

when dissolution ordered without costs, 1658.

final decision, 1658.

appeals pending, 1658.

Kentucky practice, 1659.

court may assess damages on dissolution, 1659.

remedy exclusive, not cumulative, 1659.

confined to injunctions against judgments,  
1659.

Louisiana practice, 1659.

Missouri practice, 1660.

upon dissolution, court must enter judgment  
against obligors at once, 1660.

Illinois practice, 1661.

suggestion of damages may be filed at any  
time before final decree, 1661.

error to refuse leave to file, 1661.

assess without suggestion in  
writing, 1661.

not regarded as a new proceeding, 1661.

jury trial rests in discretion of court, 1661.

appeal lies from order assessing damages, 1661.

evidence must be preserved, 1661.

does not authorize assessment against sureties,  
1662.

when assessment condition precedent to recovery on bonds, 1662.

limit of damages, 1662.

subsequent statute, 1662.

statute applies when relief sought, either incidentally or as main relief, 1662.

writ need not actually issue, 1662.

where interlocutory dissolved but no final hearing, 1662.

damages, 1663-1684.

counsel fees, 1685-1692.

# INSOLVENCY,

of maker of note, suit on, not enjoined, 82.

of judgment creditor as affecting right to set-off, 243.

of vendor, ground for enjoining collection of purchase money,  
400.

## THE REFERENCES ARE TO THE SECTIONS.

INSOLVENCY — *Continued.*

- of trustee, no ground for enjoining sale under deed of trust, 451.
- of tax assessor, no ground for injunction, 491.
- of tax collector, ground for injunction, 509.
- of defendants and removal of improvements in actions of waste, 653.
- of surety of administrator, no ground for enjoining waste, 665.
- tenants in common not enjoined from cutting timber unless averred, 692.
- of defendant, ground for injunction in trespass, 717.
  - need not be absolute, 727.
- when validity of patent established, need not be shown, 954.
- of defendant, when relief sought against use of corporate name, 1081.
- of one, where two mutually indebted on notes, 1128.
- of bank, affidavits of must be positive, 1189.
  - suspension of specie payments, 1189.
- of corporation, receiver may enjoin actions against, 1196.
- continuing partner enjoined from selling, 1342.
- of partner, as ground for relief, 1344.
  - and receiver, 1353, 1355.
- of executor not sufficient to enjoin sale, 1361.
- sale by executor under fraudulent mortgage enjoined, 1336.
- of principal, purchaser after judgment enjoined from removing property, 1378.
- creditor with judgment after winding up of estates for, enjoined, 1408.

## INSURANCE COMPANY,

- statutory jurisdiction in cases affecting, 1189, n.

## INTEREST,

- injunction does not prevent enforcement of, 1133.
- providing for semi-annual, instead of annual, in aid bonds, 1284.
- on sum enjoined recoverable as damages, 1666.

## INTERLOCUTORY INJUNCTION (see DISSOLUTION),

- definition and nature of, 3.
- not conclusive as to right, 3, 5.
- object of, 4.
- not retrospective, 4.
- does not anticipate ultimate decision, 5.
- not conclusive, 3, 5.
- how far probability of recovery considered on application for, 5.
- distinguished as common and special, 6.
- what must be shown in obtaining, 7.
- pending contest as to legal right, when refused, 8.
  - when granted, 8.



THE REFERENCES ARE TO THE SECTIONS.

INTERLOCUTORY INJUNCTION — *Continued.*

- substantial injury necessary to, 9.
- not allowed when plaintiff has no title, 9.
  - to encourage litigation, 9.
- utmost care necessary in granting, 10.
- effect of acquiescence, 10.
- right to, not *ex debito justitiæ*, 11.
- discretion of court in granting, 11.
- convenience and inconvenience considered on application for, 13.
- as affecting possession of property, 14.
- when becomes effective, 17.
- threats sufficient ground for, 18.
- insolvency insufficient for, 18.
- nature of danger warranting, 22.
- not allowed for past act, 23.
- usually granted on bill, 31.
- when bill unnecessary, 31, 32.
- not continued after cause removed, 41.
- conflict between two railways, retained, 610.
- against trespass, should be dissolved when answer claims title and shows solvency, 698.
- when discretion of inferior court in enjoining against trespass not controlled, 720.
- against trespass, when retained, 721.
- when doubtful whether bridge will be nuisance, granted, 834.
- in patent cases, discretion of court in granting, 935.
- when patent recent, will be refused, 936, 939.
- patent and infringement must be clear, 938, 939.
- prior use of invention a bar, 943.
- granting of, in patent case, not an adjudication, 958.
- will not decide merits of *bona fide* issue on application for, in patent cases, 960.
- effect of public convenience, and injury to third persons in granting against infringements, 974.
- court must be satisfied of validity of patent of novelty and infringement, 975.
- refused when copyright or infringement doubtful, 1026.
- deposit of money in lieu of, 1052.
- where right to use labels doubtful, refused, 1095.
- when right in trade mark doubtful, refused, 1097.
- restraining payment of note, effect of, 1125.
- against resuming business in employ of third person, 1176.
- acquiescence in removal from office bars, 1194.

THE REFERENCES ARE TO THE SECTIONS.

**INTERLOCUTORY INJUNCTION** — *Continued.*

- ex parte*, receiver of partnership not of course, 1350.
- against husband, when answer denies abandonment, dissolved, 1394.
- usually granted on bill alone, 1574.
- refusal to grant, no bar to future application, 1586.
- may omit non-resident defendant on motion for, 1598.
- appeals from granting of, 1693-1701.
- dissolution of, 1702-1711.

**INTERPLEADER,**

- injunction in aid of, 53.
- statute requiring payment into court applies to, 145.

**IRREPARABLE INJURY,**

- necessary to injunction, 7, 22.
- general allegations of, insufficient, 34.
- court must be satisfied as to, 35.
- how averred in bill to enjoin tax, 491.
- must be averred in bill to enjoin opening streets, 586.
- to interfere with municipal control of streets, 587, 588.
- existence of, ground for injunction against opening streets and highways, 597.
- need not be shown when railway exceeds powers, 612.
- necessary to enjoin trespass, 697, 701.
- illustrations of, in trespass, 702, 717, 724.
- necessary to enjoin nuisance, 740, 791.
- to road, 817.
- when right doubtful, public work not enjoined in absence of, 833.
- must exist to warrant interference with mill-dam, 839.
- contra*, 840, n.
- necessary to enjoin easement, 848.
- obstruction to right of way, 886.
- existence of, ground for injunction pending action at law, 887.
- ground for enjoining infringement of patent, 934.
- when validity of patent established, need not be shown, 954.
- ground for enjoining infringement of copyright, 988.
- breach of contract, 1106.
- contract not to enter into trade, 1168.
- corporation, 1184, 1185.
- continuing trespass by, 1187.
- allowance by corporation of improper account not an, 1222.
- conspiracy by minority of shareholders to control election is an, 1233.

## THE REFERENCES ARE TO THE SECTIONS.

IRREPARABLE INJURY — *Continued.*

- from act of municipality, ground for relief, 1236.
- municipal improvements; illustrations, 1271.
- ground for enjoining public officers, 1308, 1321.
- injunction not dissolved when it will result in, 1509, 1510.
- relief granted on supplemental bill, without notice, to prevent, 1579.
- is question for court on facts stated, 1581.
- relief granted on Sunday to prevent, 1584.

## J.

## JAIL,

- erection of, not enjoined, 789.

## JOINT TENANTS,

- equity will not ordinarily restrain waste by, 692.

## JUDGE,

- United States district, power of, to grant injunctions, 43.
- injunction not allowed against, 46.
- illegal gift to, by municipality, restrained, 1239.
- writ allowed by, at chambers, dissolution of, 1599.

## JUDGMENTS,

- in criminal matters, not enjoined, 20.
- foreign, when fraudulent action on enjoined, 69.
- when not enjoined, 91.
- injunctions against, 112-281.
  - general features of the jurisdiction, 112-164.
    - origin and history of, 112.
    - not a favorite jurisdiction, 113.
    - not sufficient to show injustice, 113.
    - the general rule stated, 114.
    - merits and diligence must be shown, 114.
      - bill to procure new trial, 115-117.
      - newly discovered evidence, 115-117.
  - not enjoined because erroneous, 118.
    - when fraud alleged on information, 118.
  - sale under execution against third person, 119, 120.
    - not enjoined when remedy at law, 120.
    - of real estate not enjoined, 120.
    - claimant under fraudulent sale not protected, 120.
    - relief refused broker, 120.
  - excessive levy no ground for relief, 121.
  - seizure of immovable property first, no ground for relief, 121.

THE REFERENCES ARE TO THE SECTIONS.

# JUDGMENTS—*Continued.*

- exempted property, injunction against sale of, 122.
- payment of judgment as ground for injunction, 123.
- criminal judgments not enjoined, 124, 157.
- defect of jurisdiction no ground for enjoining, 125.
- not enjoined when not oppressive, 126.
- must appear that plaintiff had no cause of action, 126.
- not enjoined because of hardship to others, 126.
- effect of injunction upon lien of judgment, 127.
- injunction against, when a release of errors, 128, 129.
- amount due must be paid, 130.
- disposition of property under judgment not enjoined
  - by general creditor, 131.
- bill to enjoin, when not original, 132.
  - when original, 132.
  - parties to, 132.
- when not enjoined, 133.
- writ of error no bar to enjoining, 133.
- failure of consideration as ground for enjoining, 134.
- sale under execution, when injunction operative, 135.
- duty of sheriff when execution enjoined, 135.
- money need not be brought into court unless danger of insolvency, 135.
- effect of death of plaintiff or defendant, 136.
- United States not enjoined from enforcing judgment paid, 137.
  - not allowed to enjoin sale of vessels on execution, 137.
- amount due on judgment must be paid, 138.
- judgment of less than statutory limit not enjoined, 139.
- judgment in replevin, when enjoined, 139.
- judgment not enjoined because of two funds for satisfaction, 139.
- against railroad, satisfaction out of personal property, 140.
- levy on heirlooms not enjoined, 141.
- effect of injunction on sale of personalty, 142.
  - on judgment subsequently obtained, 142.
- not enjoined because of suit for unliquidated damages, 142.
- when enjoined for protection of surety, 143.
- against administrator, when enjoined, 144.
- statute requiring payment into court applicable to interpleader, 145.
- effect of failure to answer bill, 146.
- agreement by third person to pay execution, 146.
- judgment on bonds for purchase money at trust sale, 147.
- execution or judgment against city, when enjoined, 148.

## THE REFERENCES ARE TO THE SECTIONS.

JUDGMENTS — *Continued.*

- defiance of court by creditor, ground for enjoining, 149.
- sheriff not enjoined because of proceedings on error, 150.
- arrangement between judgment debtors, 151.
- transfer of judgment by creditor, 151.
- judgment for or against guardian, 152.
- parties to the injunction suit, 153.
- execution pending appeal, enjoined, 154.
- judgment on note, enjoined to protect indorser, 155.
- execution against tax collector not enjoined, 156.
- mechanic's lien, when protected, 158.
- bond necessary to enjoin payment on levy, 159.
- for good-will of business not enjoined, 160.
- bill to enjoin, dismissal not interfered with, 161.
- judgment on injunction bond not enjoined, 161.
- injunction against, when dissolved, 162.
  - damages on dissolution, 163.
  - effect of dissolution, 164.
- defense at law, 165-189.
  - judgment not enjoined when defense could have been made at law, 165.
  - rule enforced regardless of hardship, 166.
  - plea of *non est factum*, 167.
  - pleas held bad, 167.
  - absence of witness or plaintiff, 167.
  - failure of proof no ground for relief, 168.
  - failure to defend, 169.
  - usury no exception to rule, 170.
  - maintenance, 170.
  - defendant a minor, 170.
  - payment on note, 170.
  - defendant prevented from attending court, 170.
  - witness suborned, 170.
  - judgment in tort, 171.
  - rule applies to decrees in equity, 172.
  - remedy by appeal bars injunction, 173.
    - exception to rule, 174.
  - execution not enjoined when relief may be had by application to court, 175.
  - rule applied to sales of personalty, 176.
  - two executions, 177.
  - premature execution, 177.
  - unauthorized execution, 177.
  - effect of failure to defend, 178.

THE REFERENCES ARE TO THE SECTIONS.

JUDGMENTS — *Continued.*

- equity will not enjoin when defendant has had opportunity to be heard, 179.
- not enjoined, on defense interposed in the action, 179.
- after-acquired facts, 180.
- facts within knowledge of adverse party, 180.
- illegal arrest, 180.
- neglect of party or counsel, 181.
- failure to plead discharge in bankruptcy, 181.
- sale by sheriff, conflicting claimants, 182.
- exceptions to the general rule, 183-189.
  - remedy at law inefficient, 183.
  - equities not available at law, 184.
  - sale under execution against third person, 184.
  - judgment in slander, mental derangement, 185.
- jurisdiction of equity first attaching, 186.
- misrepresentation as to consideration of note, 187.
- assignee of note for value protected, 187.
- how failure to defend at law taken advantage of, 188.
- want of jurisdiction, when urged at hearing, 188.
- sickness of defendant at law, 189.
- judgment against *feme covert*, 189.
- judgments obtained through fraud, 190-208.
  - may be enjoined, 190.
  - by consent enjoined, 191.
  - fraudulent assurances from opposing party, 191.
  - fraudulent alteration of records, 192.
  - fraud in obtaining bill of sale, 192.
  - when fraud can not be urged at law, 193.
  - diligence necessary, 194.
  - fraud construed under statute, 195.
  - parties to the proceeding, 195.
  - violation of agreement, 196.
  - forged assignment of bond, 197.
  - statutory judgment on forfeiture of bond, 198.
  - sale enjoined under collusive judgment, 198.
  - judgment discharged, 198.
  - defense prevented by fraud, 199, 200.
  - agreements for payment of judgment, 201.
  - fraud in obtaining surety to note, 201.
  - fraud by attorney, ground for relief, 202.
  - fraud may consist in silence, 203.
  - satisfactory proof required, 204.

THE REFERENCES ARE TO THE SECTIONS.

# JUDGMENTS — *Continued.*

- plaintiff must come into court with clean hands, 205.
- deceit in sale of medicinal compound, 206.
- effect of perpetual injunction, 207.
- execution enjoined when judgment vacated, 208.
- accident, mistake, ignorance, and surprise, 209-224.
  - judgments obtained through, enjoined, 209.
  - distinction between accident and carelessness, 210.
- absence of parties, witnesses or counsel, 210.
- sickness of defendant, 210.
- offer of compromise, 210.
- misconduct of attorney, 210.
- mistake, of fact and law distinguished, 211, 212.
  - of law, no ground for enjoining, 211.
  - of fact, sufficient ground, 212.
  - of clerk, 213.
  - coupled with ignorance, 213.
  - of jury, 213.
  - in amount, excess only enjoined, 214.
  - of court, ground for relief, 215.
  - of counsel, no ground for relief, 216.
  - failure by attorney to enter credit, 216.
  - laches a bar to relief, 217.
  - relief denied where remedy at law, 218.
- ignorance of fact and law, distinguished, 219.
  - of law, no ground for relief, 219.
  - of fact, ground for relief, 220.
  - of counsel, no ground for relief, 221.
  - false return of service by sheriff, 222.
  - use of due diligence, 222.
  - effect of negligence, 222.
  - of assignee of note, 223.
- surprise, ground for relief, 224.
- irregular, erroneous and void judgments, 225-231.
  - irregularities no ground for relief, 225.
  - errors in judgment of court no ground for injunction, 226.
  - failure to appoint guardian *ad litem*, 227.
  - justices' judgments, insufficient evidence, 227.
  - void judgment, authorities conflicting, 228.
    - for want of service of process, 229.
    - test whether remedy at law, 230, 231.
    - sale under execution under, 231.

## THE REFERENCES ARE TO THE SECTIONS.

JUDGMENTS — *Continued.*

- upon usurious contracts, 232-234.
  - not usually enjoined, 232.
  - when enjoined, 233.
  - not enjoined in behalf of others, 234.
- upon gaming contracts, when enjoined, 235.
  - when defense should be made at law, 236.
- set-offs, 237-244.
  - judgment not usually enjoined for, 237.
  - breach of warranty, damages from, 238.
  - wrongful attachment, 238.
  - equitable, 239.
  - fraud and collusion, 240.
  - ignorance, 241.
  - partial, 241.
  - existence of cross-demands insufficient, 242.
  - uncertainty as to amount, 242.
  - acquired after verdict, 242.
  - as affected by insolvency, 243.
  - judgments set off against each other, 244.
  - insolvency of *cestui que trust*, 244.
- affecting title, 245-264.
  - sale not enjoined because of irregularities, 245.
  - sale of real estate of third person, 246.
    - distinction between legal and equitable title, 246.
    - when enjoined, 247.
  - prevention of cloud upon title, 248, 249.
  - failure of title, when judgment for purchase money enjoined, 250, 251.
    - damages not allowed, 251.
  - enforcement of judgment contrary to stipulation, 252.
  - when purchasers protected, 252.
  - writ of restitution not enjoined, 253.
  - judgment in another county no bar to foreclosure sale, 254.
  - mortgagee not enjoined from ejectment, 254.
  - property held in trust, 254.
  - subsequent judgment creditor not enjoined by holder of prior lien, 255.
  - creditors of mortgagor enjoined from levying on crops, 255.
  - surety in replevin denied relief, 256.
  - commissioner in chancery enjoined from sale, 257.
  - when injunction retained to hearing, 258.



## THE REFERENCES ARE TO THE SECTIONS.

JUDGMENTS — *Continued.*

- release of land under judgment, 258.
- excessive levy no ground for relief, 259.
- financial stringency no ground for relief, 259.
- forcible detainer, 260.
- possession not interfered with, 260.
- sale under fraudulent judgments enjoined, 261.
- sale not enjoined for inaccuracies, 261.
- creditors not enjoined from selling buildings erected by debtor, 262.
- sale of farming stock and crops, 262.
- when garnishee proceedings enjoined, 263.
- sale as affected by voluntary assignment, 264.
- court in which judgment is rendered, 265-272.
  - concurrent jurisdiction, 265.
  - inferior and superior courts, 265.
  - state courts will not enjoin judgments in federal courts, 266.
  - may protect such judgments, 267.
  - federal courts will not enjoin judgments in state courts, 268.
  - exception to rule, 268.
  - judgments of foreign state, injunction against, 269.
  - decree in chancery, injunction against, 270.
  - injunction against judgment, not binding in foreign country, 271.
  - criminal proceedings not enjoined, 272.
- awards, 273-276.
  - judgment on, when enjoined, 273.
  - when not enjoined, 274.
  - diligence necessary, 275.
  - false testimony and deceit, 276.
- by default and confession, 277-281.
  - by default, rarely enjoined, 277.
  - diligence necessary, 278.
  - by confession, not ordinarily enjoined, 279.
  - when enjoined, 280.
  - enjoined in action upon, in other state, 281.
- execution, enjoined after petition in bankruptcy, 283.
- when injunction against refused in aid of bankruptcy, 290.
- against bankrupt, when enjoined, 296.
  - failure to plead discharge, 296.
  - discharge under state laws, 297.

THE REFERENCES ARE TO THE SECTIONS.

# JUDGMENTS — *Continued.*

- satisfied, enjoined as cloud upon title, 374.
- for unpaid purchase money, when enjoined, 382-413.
- in ejectment, not enjoined on grounds available in defense, 415.
  - enjoined for fraud, 418.
- fraudulent, when tax enjoined in payment of, 500.
- on gaming contract, not enjoined when no defense made at law, 1115.
- for breach of covenant in lease, not enjoined, 1146.
- before and after winding up corporation, 1195.
- shareholder can not enjoin judgment confessed on authorized debt, 1214.
- sale of corporate property on execution, 1218.
- when binds shareholders, 1218.
- in favor of receiver for unpaid subscriptions, 1218.
- holder of county order mere general creditor, 1268.
- city bonds, 1268.
- execution of, against municipality, enjoined when void, 1300.
- between partners, when enjoined, 1332.
- for individual debt, enforcing against partnership, 1334.
- against administrator, when set-off discovered or no assets, enjoined, 1363.
- against executor for personal liability, not enjoined, 1364.
- by default of executor on stale claim, enjoined, 1366.
- against testator, not enjoined, 1369.
  - legatee, when enjoined, 1370.
- surety may enjoin when ignorant of agreement not to sue, 1375.
- against surety, effect of laches and agreement not to enforce, 1381, 1382.
- against surety, does not merge in judgment on injunction bond, 1384.
- against husband, wife's property protected, 1387, 1388.
  - debtor can not enjoin on ground of secret ante-nuptial contract, 1400.
- injunctions in behalf of creditors, 1402-1415.
- dissolution of injunctions against proceedings at law, 1536-1541.
  - against execution, effect of, 1536.
  - injunction dissolved in part and retained in part, 1538.
  - credits not allowed on judgment, 1539.
- when officers of court necessary parties, in bill to enjoin, 1551.
- parties in bill to enjoin, 1552.
  - where United States court has no jurisdiction over, 1552.
- tax to pay void judgment against school district, enjoined, 1557.

## THE REFERENCES ARE TO THE SECTIONS.

JUDGMENTS — *Continued.*

- transcript of, should be annexed to bill, 1572.
- of liability on bond when enjoined, 1623, 1639.
  - effect of second suit against same, 1625.
- statutes prohibiting injunction against, construed, 1628.
- injunction against right of action on bond, 1651.
  - where court had no jurisdiction, 1652.
- damages when injunction against dissolved, 1666, 1667, 1668.
- amount of appeal bond in dissolving injunction against, 1711.

## JUDGMENT CREDITORS. (See CREDITORS.)

## JUDICIAL SALES. (See SALES.)

## JURAT,

- neglect of officers to sign, no ground for dissolution, 1614.

## JURISDICTION,

- courts of co-ordinate, relief as between, 15.
- foreign, parties and property in, 33.
- by injunction, original and not appellate, 42.
- of courts of last resort in injunctions, 42.
- of circuit courts, 43.
- want of, ground for prohibition, 43.
- in restraint of actions at law, grounds of, 45-88.
- of court first attaching, not interfered with, 50, 51.
- want of, no ground for enjoining action, 89.
- of state and federal courts, injunctions as between, 108-111.
- defect of, no ground for enjoining judgment, 125.
- want of, when urged at hearing, 188.
- equity has, when injury from levee irreparable, 802.
- of person, sufficient in infringement of patent, 980.
  - when residence and place of infringement agree, 980.
- foreigners subject to, 985.
- in cases of corporations, founded in trust, 1184, 1236.
  - cautiously exercised, 1185.
  - banks, purely statutory, 1189.
  - insurance companies, 1189, n.
- restraining corporate elections, 1230.
- court has none, to test validity of county organizations, 1249.
- administration of estates part of original, 1365.
- court must have, to attach for contempt, 1425.
- only considered on attachment for contempt, 1430.
- where right is equitable, injunction against suit continued, 1537.
- where United States court has none, over new parties introduced in bill to enjoin judgment, 1552.
- remedy on bond, when court had none, 1652.

THE REFERENCES ARE TO THE SECTIONS.

## L.

**LACHES** (see **ACQUIESCENCE**),

effect of, considered, 7.

in enjoining actions at law, 78.

judgment, 116.

because of mistake, 217.

judgment on award, 275.

collection of purchase money, 383, 412.

construction of railroad, 618, 643.

working of mines, 667.

as a bar to relief against nuisance, 786.

mill-dam, 847.

obstruction to ancient lights,  
867.

franchise in road, 913.

infringement of copyright,  
1028, 1029, 1030.infringement of musical com-  
position, 1056.

breach of contract, 1119.

breach of covenant, 1159.

in correcting illegal issue of stock, a bar, 1234.

during construction of municipal improvement, under  
void contract, 1251, 1262.of creditor in enforcing judgment against principal,  
1381.in obtaining service of writ as affecting punishment  
for breach, 1451.

and acquiescence, a bar to a dissolution, 1480.

of plaintiff, when answer denies equities, 1516.

several defendants, 1529.

in prosecuting action affecting title, 1542.

**LANDLORD.** (See **LANDLORD AND TENANT.**)**LANDLORD AND TENANT,**

injunctions as between, 75, 430-437.

waste by tenant enjoined, 430.

removal of crops by tenant, when enjoined, 430.

when tenant protected by injunction, 431.

eviction for non-payment of rent not usually enjoined, 432.

destruction by fire no ground for injunction, 432.

tenant holding over, no ground for injunction, 432.

removal of fixtures, when enjoined, 433.

## THE REFERENCES ARE TO THE SECTIONS.

LANDLORD AND TENANT—*Continued.*

- infant tenant, when enjoined from selling furniture, 433.
- waste by tenant, injunctions against, 434, 659, 663, 689, 690.
- nuisance by tenant, when enjoined, 435.
- violation of restrictive covenants in leases enjoined, 436.
- use of estovers, when enjoined, 437, 690.
- questions of ancient light between, 864.
- improper use of bridge by tenant enjoined, 920.
- use of premises adverse to covenants gives no title, 1143.
- subsequent lessees of original lessor enjoined from breach of covenant, 1151.

## LATERAL SUPPORT,

- right to, protected, 753, 852.

## LAW REPORTS,

- copyright in, 1003, 1010.
- executor of reporter can not enjoin publication under renewal, 1058.
- contract to furnish cases for, not enforced, 1162.

## LEASE (see LANDLORD AND TENANT),

- restrictive covenants in, violation enjoined, 436, 1142-1151.
- on sale of good-will, lease of other premises for same business, 1169.
- bona fide*, by corporation, not enjoined, 1215.
- of entire corporate property, enjoined, 1227.
- of public square, lot owners can not enjoin, 1553.

## LEGATEES,

- rights of, in realty, 339.
- judgments against, when enjoined, 1370.
- sale of legacies under execution against, enjoined, 1374.
- after proving claim under decree for account, enjoined from suing executor, 1408.

## LEGISLATURE,

- applications to, to change corporate powers, when enjoined, 1208, 1209, 1259.
- municipality can not enjoin railway authorized by, 1276.

## LESSEE. (See LANDLORD AND TENANT.)

## LESSOR. (See LANDLORD AND TENANT.)

## LETTERS,

- publication of, enjoined, 1012.
  - relating to patent, 1012, n., 1015.
  - partnership, 1349.

## LEVY. (See EXECUTION; JUDGMENT; TAXES.)

## LIBEL,

- publications containing, 1015, 1093.

## THE REFERENCES ARE TO THE SECTIONS.

**LICENSE,**

- to sell liquors, revocation of, not enjoined, 1242.
- on occupations, injunctions concerning, 1242.

**LIEN** (see **MECHANIC'S LIEN**),

- of judgment, effect of injunction on, 127.
- of vendor, removal of emblements pending suit for, 331.
- creditor having, may enjoin fraudulent transfers of property, 1404.
- where debts due from a deceased person are made such by law, 1406.
- damages incurred from injunction form part of lien of judgment, 1667, n.

**LIGHT,**

- easements in, 859-869.

**LIMITATIONS, STATUTE OF,**

- injunction refused against plea of, 79.
- effect of fraud, 79.
- effect of injunction on, 87.
- no ground for enjoining sale under deed of trust, 452.
- against payment of note, 1133.
- plea of, on motion to dissolve, 1492.
- on injunction bond, 1649.

**LIS PENDENS,**

- prevents injunction against transfer of realty, 333.
- voluntary purchase of land during, effect of, 911.

**LOTTERY,**

- right to conduct, protected, 908.

**M.****MACHINERY,**

- removal of, from mortgaged premises, 481.
- master of vessel enjoined from using patented, 951.
- chief engineer punishable for using, 1443.

**MANDAMUS,**

- to grant or dissolve injunction, not allowed, 15.
- proceedings for, not enjoined, 68, 90, 272.
- not allowed to compel trial of suit enjoined, 83.
- to compel appeal, tax sale not enjoined, pending, 519.
- effect of injunction on, 1317.
- injunction does not issue in aid of, 1328.
- payment of money pending contest, 1328.
- after writ of, injunction against act, 1447, n.
- will not lie to compel dissolution on giving security, 1497.

## THE REFERENCES ARE TO THE SECTIONS.

**MANDAMUS** — *Continued.*

- lies in Louisiana to compel granting of appeal from interlocutory injunction, 1695.
- from order dissolving, 1704.

**MANDATORY INJUNCTION,**

- nature of, 2.
- principles governing, 2.
- to deliver possession, when allowed, 358.
- not allowed to compel use of wharves, 616.
- prohibiting flooding of tracks, not a, 646.
- granted when trespass is irreparable and continuing, 708.
  - lessee works into adjoining mine, 737.
- against nuisance to dwellings, 792.
  - to water, 804.
- granted to restore ancient lights, 860.
- granted to compel removal of building, 1150, 1158.
  - after firm books removed, 1331.

**MARRIAGE BROKAGE,**

- note given for, 1127.

**MARRIED WOMEN** (see **HUSBAND AND WIFE**),

- judgment against, when not enjoined, 277.
- property held in trust for, sale enjoined, 371, 700, 1387.
- next friend of, can not verify bill, 1567.

**MECHANIC'S LIEN,**

- when protected, 158.
- action for, not enjoined, 336.

**MEDICINE,**

- right to manufacture, deceit in sale of, 206.

**MEMORY,**

- play secured by, enjoined, 1043.

**MILL,**

- sale of, for taxes, not enjoined, 505.
- owners of, enjoined from flooding tracks, 646.
- not a nuisance *per se*, 737.
- planing, not enjoined when question of nuisance doubtful, 788.
- erection of, near track enjoined, 791.
- diversion of water from, enjoined, 796.
- fouling water leading to, enjoined, 805.
- one co-tenant enjoined from diversion of water, 806.
- right to alternate use of water protected, 806.
- when legal right disputed relief refused, 806.
- waste of water supplying, enjoined, 807.
  - not when injury small, 807.
- easements in water, 870-885.
- can not enjoin rightful repair of bridge by municipality, 1240.

## THE REFERENCES ARE TO THE SECTIONS.

**MILL-DAMS,**

injunctions concerning, 839-847.

**MINES,**

litigation concerning, injunction granted, 329.

when working of enjoined, complainant must show diligence, 667.

account decreed when waste not enjoined, 670.

trespass to, 730-738.

discharge from, when injurious to water, enjoined, 805.

removal of machinery in mines enjoined, 1144.

transfer of lost and valuable stock of, enjoined, 1220.

**MINISTERS.** (See ECCLESIASTICAL MATTERS.)**MISTAKE,**

ground for enjoining actions, 47.

judgments, 209.

of law and fact, distinguished, 211, 212.

of law, judgment not enjoined for, 211.

of fact, judgment enjoined, 212.

in entry of appearance, 212.

in service of process, 212.

of clerk of court as ground for relief, 213.

coupled with ignorance, 213.

judgment or execution too large, excess only enjoined, 214.

of court, as ground for relief, 215.

of counsel, no ground for relief, 216.

laches, effect on, 217.

remedy at law, effect on, 218.

in sheriff's deed, ground for enjoining ejectment, 421.

in mortgage or deed of trust, when ground for enjoining sale, 449.

when ground for enjoining ejectment, 466.

or delivery of deed under foreclosure, 466.

in certifying tax, tax enjoined, 563.

**MONOPOLY,**

not protected, 911.

of gas company, 911.

**MORTGAGES** (see CHATTEL MORTGAGE; DEED OF TRUST),

when paid, foreclosure enjoined, 99.

foreclosure, when not enjoined, 254.

when enjoined in bankruptcy, 294.

securing purchase money, when enjoined, 402.

injunctions pertaining to, 442-483.

in behalf of mortgagors, 442-461.

sale under, when enjoined, 442.

not enjoined when amount due not tendered, 443.



## THE REFERENCES ARE TO THE SECTIONS.

MORTGAGES — *Continued.*

- foreclosure of, not usually enjoined, 444.
- unliquidated demands of mortgagor, no ground for enjoining sale, 444.
- note in suit, no ground for enjoining sale, 444.
- payment of, ground for injunction, 445.
- heirs necessary parties to bill by administrator, 446.
- usury as ground for enjoining foreclosure, 447.
  - effect of remedy at law, 447.
  - amount legally due, when must be tendered, 447.
- complicated accounts, when ground for enjoining foreclosure, 448.
- mistake in, ground for enjoining, 449.
- equity of redemption, mortgagor restrained from selling, 450.
- homestead interest, no ground for enjoining, 450.
- insolvency of trustee, no ground for, 451.
- want of notice by trustee, ground for, 451.
- sale not enjoined when debt due and unpaid, 452.
- proceedings at law to recover debt, when mortgagee not enjoined from, 453.
  - when enjoined as to deficiency, 453.
- hard times no ground for enjoining, 454.
- conveyance instead of mortgage, when sale enjoined, 455.
- sale under power, in another state, not enjoined, 456.
  - without redemption, not enjoined, 456.
- national bank enjoined from sale under deed of trust, 457.
- judgment against mortgagor in other county no ground for enjoining, 458.
- contest between assignor and assignee, effect of, 459.
- injunction against sale, when sought by purchaser, what averments necessary, 460.
- dissolution of injunction, when allowed, 461.
  - when refused, 461.
- of chattels, when sale enjoined, 461 *a*.
- mortgagees, injunctions in behalf of, 462-468.
  - junior, when allowed relief, 462.
    - as against judgment creditors, 463.
    - of railroad, protected against subsequent lien, 463.
  - when denied relief against judicial sale, 463.
  - rents, when mortgagor enjoined from receiving, 464.
  - mortgagor not enjoined from transfer pending foreclosure, 465.

## THE REFERENCES ARE TO THE SECTIONS.

**MORTGAGES** — *Continued.*

- when entitled to injunction because of mistake, 466.
- may enjoin levy upon or removal of crops, 467.
- mortgaged chattels, removal enjoined, 468.
  - creditors enjoined from proceeding against, 468.
  - equity of redemption in sale of, enjoined, 468.
  - when sale enjoined, 468.
  - sale of, not enjoined, 470.
- injunctions concerning third parties, 469-477.**
  - cloud upon title enjoined, 469.
  - purchaser protected against mortgagee with notice, 469.
  - payment to judgment debtor, when enjoined, 471.
  - judgment creditor not enjoined from satisfaction out of mortgaged property, 471.
  - assignee for creditors, rights of, as against prior mortgagee, 472.
  - purchaser subject to mortgage, rights of, 472.
  - sale not enjoined when remedy at law, 473.
  - failure of title, when no ground for enjoining foreclosure, 474.
  - when sale enjoined as between tenants in common, 475.
  - foreign corporation not enjoined from mortgaging property, 476.
  - bill of sale, sale under, when enjoined, 477.
- waste of mortgaged premises, injunctions concerning, 478-483.**
  - mortgagor enjoined from, 478.
    - mortgage need not be due, 478.
    - bankruptcy of mortgagor, ground for, 478.
- grounds of relief two-fold, 479.**
- relief refused when injury may be compensated in damages, 479.**
- cutting timber, ground for relief, 480.
- removal of timber not enjoined, 480.
  - of fixtures and machinery, 481.
- waste of other premises no ground for relief, 482.**
- relief against alienee of mortgagor, 483.**
- removal of rails and planks, 483.
- assignee of, when given for contract in restraint of trade, enjoined on breach, 1183.
- discharge of by co-surety, enjoined, 1386.**

## THE REFERENCES ARE TO THE SECTIONS.

**MORTGAGEE** (see **MORTGAGES**),

not enjoined from proceeding with judgment in ejectment, 425.

injunctions in behalf of, 462-468.

after sale of equity of redemption, can not restrain waste, 696.

**MORTGAGOR** (see **MORTGAGES**),

waste by, enjoined after decree, 38.

creditors of, enjoined from levying on crops, 255.

injunctions in behalf of, 442-461.

enjoined from waste, 478-483.

in possession, enjoined from waste, 693, 694, 695.

when mind weakened by drink, foreclosure enjoined, 1108.

**MOTION**,

when injunction granted on, without new suit, 32, 49, 55.

receiver may enjoin suits against insolvent corporation, 1196.

agreement not to enforce judgment against executor, not enforced by, 1369.

English and Irish practice, when account of assets of deceased debtor decreed, 1408.

to dissolve, when entertained, 1468.

burden of proof on, 1470.

to restrain action at law, when court in full possession of cause, 1548.

tenant of receiver enjoined on, 1566.

waste in matters of lunacy enjoined on, 1566, n.

for injunction, may be made at any time before decree, 1574.

admission of affidavits in support of, 1576.

in opposition to, 1577.

notice of, 1578, 1579, 1580.

second, for relief, 1586.

existing injunction not dissolved on hearing of another, 1590.

for renewal after dissolution, 1593.

for writ, may omit non-resident defendant, 1598.

to dissolve, notice of, 1600.

when answer excluded on, 1601.

admission of affidavits on, 1603.

in support of answer, 1604.

continuance of, 1611.

multifariousness of bill, 1613.

improper joinder of parties, 1613.

**MULTIFARIOUSNESS**,

relief refused because of, 1563.

can not be taken advantage of on motion to dissolve, 1613.

THE REFERENCES ARE TO THE SECTIONS.

### MULTIPLICITY OF SUITS,

- prevention of, as ground for injunction, 12, 62.
- against street railway, enjoined, 63.
- weekly for wages, enjoined, 63.
- upon notes, enjoined, 63.
- test as to, 65.
- in ejectment, injunction against, 422.
- in trespass, ground for relief, 700, 702.
- ground for enjoining nuisance to water, 794.
  - improper completion of street, 817.
  - injury to franchise, 897, 908.
  - infringement of patent, 934.
    - copyright, 988.
  - violation of covenants in lease, 1142.
  - public officers, 1308.

prevention of, ground for extending relief to mere contract creditor; numerous attachment suits, 1406.

### MUNICIPAL BONDS (see MUNICIPAL CORPORATIONS),

- illegality of, must be specifically averred, 557, 565.
- injunction against, does not render tax invalid, 559.
- taxation in payment of, 561-569.
- in aid of railroad, tax not enjoined because of consolidation with another, 566.
- issued by *de facto* officers, not enjoined, 567.
- subscriptions for, 1282-1297.
- attorney-general can not enjoin, 1554.

### MUNICIPAL CORPORATIONS,

- unauthorized application to parliament enjoined, 26.
- execution or judgment against city, when enjoined, 148.
- encroachments upon private property by, enjoined, 349.
- judgment against, when tax not enjoined, 500.
- extending limits of, when tax enjoined, 547.
- not allowed to test legality of tax levied by another, 573.
- when tax collected will belong to, should be made defendant, 576.
- control of, over streets, not enjoined, 587, 588.
- when construction of railroad not enjoined at suit of, 598.
- authority granted by common council, when void, enjoined, 613.
- erection of urinal by, when not enjoined, 780.
- interference with drain and over-flow from, enjoined, 809.
- may enjoin diversion of highway, 819.
- discharge of sewage between, 825.
- destruction of dam by, without trial or notice, enjoined, 841.

THE REFERENCES ARE TO THE SECTIONS.

MUNICIPAL CORPORATIONS — *Continued.*

- nature and grounds of the jurisdiction, 1236-1269.
  - jurisdiction founded in trust, 1236.
  - improper disposition of property enjoined, 1236.
  - clearly illegal act enjoined, 1236.
    - contra*, 1236, n.
  - citizens and tax payers may enjoin, 1237.
  - judgment of, in matters within their jurisdiction, not revised, 1237, 1240.
  - diversion of public funds enjoined, 1237.
    - diversion to private corporation; school house; surplus revenue; purchase of land for private purpose; counsel fees; reward for defaulting official; other illustrations, 1238, 1239.
    - issuance of second order to avoid injunction against first, 1239.
    - discretion of officers in the absence of fraud
      - not interfered with, 1240.
    - city scrip; other illustrations of doctrine, 1240.
  - act *ultra vires* enjoined, 1241.
    - devoting park to cattle fair, 1241.
    - destruction of buildings, 1211.
  - remedy at law bars relief, 1242, 1243.
    - dismissal of employe, 1242.
    - building of court-house; *certiorari*; revocation of license, 1242.
    - license tax on occupations, 1242.
  - municipal legislation not enjoined, but illegal acts thereunder may be, 1243.
  - character of injury; election; title to public office, 1243.
  - suits, arrests or fines for violation of ordinances not enjoined, 1244.
    - prosecution of *quasi* criminal action not enjoined, 1244.
    - arrests by humane society not enjoined, 1244.
  - requiring boats to land at public wharf, 1245.
  - power of, over public improvements, not interfered with, 1246.
    - repeal of ordinance giving right to maintain gas works, 1246.
  - proceedings in excess of power enjoined, 1247.
    - taking all of sidewalk, 1247.
    - vacating street without necessary consent, 1247.
    - ordinance entirely void, 1247.

THE REFERENCES ARE TO THE SECTIONS.

MUNICIPAL CORPORATIONS — *Continued.*

- ordinance not enforced by injunction unless act nuisance *per se*, 1248.
- enforcement of illegal ordinance of board of health enjoined, 1248.
- invalidity of county organization not inquired into, 1249.
- where jurisdiction assumed, writ of prohibition issues, 1249.
  - two common councils of city, 1249, n.
- injunction not granted against election, 1250.
  - against canvassing board void, 1250.
  - disorder and confusion, 1250.
- letting contracts to lowest bidder, 1251.
  - disregard of conditions, ground for relief, 1251.
  - failure to advertise, 1251.
  - in action of complainants, 1251.
  - second contract treated as continuation of first, 1252.
  - discretion of board not interfered with, 1252.
- disregard of plain duty enjoined, 1253.
  - publication of tax list, 1253.
- one newspaper can not enjoin publications in another, 1253.
- annexation of territory to, 1254.
  - when illegal tax enjoined, 1254.
  - creditor, 1254.
- contract within municipal authority not enjoined, 1255.
  - plaintiff must suffer some injury, 1255.
- threatened abuse of powers enjoined, 1255.
- right must be clear; authority of officers; public buildings, 1256.
- removal of county seat, 1257.
  - majority of votes in the negative; defense not made before judgment; equity will not review decision of proper tribunal, 1257.
  - decision of proper tribunal not collaterally reviewed, 1258.
  - citizen must sustain special injury, 1258.
  - second election reversing first, 1258, n.
- improper application to parliament enjoined, 1259.
- failure to invoke legal remedy a bar to relief, 1260.
  - public buildings, 1260.
- organization of, not enjoined, 1261.
  - attorney-general; *quo warranto*; correction of errors of, 1261.
- incurring debts in excess of limit, 1262.
  - delay of several months, 1262.

THE REFERENCES ARE TO THE SECTIONS.

**MUNICIPAL CORPORATIONS — *Continued.***

- misapplication of school funds; school house in wrong place; removal of school, 1263.
- interference by, with receiver, 1264.
- subsequent statute making act misdemeanor no bar to injunction, 1265.
- denial of right of appeal a ground for relief, 1266.
- employment of additional counsel not enjoined, 1267.
- holder of county order mere general creditor, 1268.
- holder of city bonds can enjoin further issue, 1268.
- moral obligation, 1268.
- use of school for other than school purposes enjoined, 1269.
- any tax payer may enjoin, 1269.
- municipal improvements, 1270-1281 *a.*
  - discretion, in absence of fraud, not interfered with, 1270.
  - judges of necessity of work, 1270.
  - change of grade of street, 1270, 1271.
  - continuation of street; bridge, 1270.
  - harshness of law, 1270.
  - proceedings in excess of power enjoined, 1271.
  - want of petition of property owners, 1271.
  - tax payer may sue in behalf of himself and others, 1271.
  - possible lien from, 1271.
  - other illustrations, 1271.
  - multiplicity of suits; irreparable injury; adverse claim ground for relief, 1271, *n.*
  - interference with private property enjoined, 1272.
- improvements of street, removal of buildings, 1272.
- opening street without condemnation, 1272, 1273.
- improvements by owner not enjoined, 1273.
- general averment of collusion by corporate authorities, 1274.
- railway; narrowing street, 1274.
- act injurious to property owners enjoined, 1275.
- misappropriation of land dedicated to public use, 1275.
- opening street over land of state enjoined, 1276.
- state may modify its grant; street railway, 1276.
- police power of, not interfered with, 1277.
- ground used for many years as street, 1277.
- closing up street enjoined upon tender of award of damages, 1277.

THE REFERENCES ARE TO THE SECTIONS.

MUNICIPAL CORPORATIONS — *Continued.*

- construction of sewer over private property enjoined, 1278.
  - irregularities in form of contract, 1278.
  - acquiescence, 1278.
- granting of land not enjoined by one who has no title, 1279.
- approach to bridge, 1280.
  - private owner; breach of paving contract, 1281.
- gas, water, telegraph and street railway companies, 1281 *a*.
- municipal-aid subscriptions, 1282–1297.
  - unconstitutional donation enjoined, 1282.
    - illustrations, 1282.
  - not sanctioned by legislative authority, 1283.
    - avermment on information sufficient, 1283.
    - issuance of, enjoined, 1283.
    - municipality may enjoin, 1283.
- statutory conditions must be complied with, 1284.
  - preliminary vote; time and notice, 1284.
    - provision for payment in twenty instead of ten years, 1284.
    - interest; other illustrations, 1284.
  - court will determine validity of, 1285.
    - not go behind statutory evidence of conditions, 1285.
- holding of election not enjoined, 1286.
- aliens allowed relief, 1287.
  - United States court has jurisdiction, 1287.
- when proceedings regular relief refused, 1288.
  - imposition of conditions on railway, 1288.
  - avermment that defendants are officers necessary, 1288.
  - tax payer may be estopped, 1288.
- when proceedings irregular, delivery enjoined, 1289.
  - leasing road instead of constructing, 1289.
  - delegation of decision to trustees, 1289.
  - non-compliance with conditions, 1290.
- where officers of railway *de facto*, relief refused, 1290.
- change in nature of enterprise ground for relief, 1291.
  - purchase of railroad running at right angles with first, 1291.
- contingent upon others, 1292.
  - validity; time of election, 1292.
- Wisconsin doctrine distinguishing between donation and subscription to stock, 1293.



THE REFERENCES ARE TO THE SECTIONS.

# MUNICIPAL CORPORATIONS — *Continued.*

- state treasurer may be enjoined, 1294.
  - replacement of amount not enjoined, 1294.
  - bonds actually issued, 1295.
    - negotiation enjoined, 1295.
  - proceeds of tax in hands of official custodian, 1296.
  - parties, 1297.
    - railway; directors, 1297.
    - county court making subscription, 1297.
    - bondholders; county agent, 1297.
    - city; board of commissioners, 1297.
  - parties, 1298-1307.
    - special injury requisite, 1298.
    - tax payers proper plaintiffs, 1298.
    - unconstitutional ordinance, 1298.
    - illegal appropriation to railway, 1298.
    - municipal authorities proper defendants, 1298.
    - railway; private corporation; school; jail, 1299.
    - excess of maximum indebtedness; void judgment; annexation of contiguous property, 1300.
    - must suffer other than general injury, 1301.
    - removal of market; sale of public park, 1301.
    - must sue in good faith, 1302.
    - where injury public, attorney-general may sue, 1303, 1554.
      - use of public park for other purposes, 1303.
    - after purchase of public common and tax levy, residue of payment not enjoined, 1303.
    - necessity for, and right of attorney-general to sue, 1304.
      - illegal subscription to railway, 1304.
      - when commissioners authorized by act to issue bond, 1304.
    - joinder of tax payers as plaintiffs, 1305.
    - performance of duty not prevented by injunction, 1306.
      - if municipality acquiesces person interested may object, 1306.
    - receipt of warrants not enjoined, 1306.
    - city necessary party in action to enjoin salaries, 1307.
    - sequestration issues against, for gross contempt, 1460.
    - attorney-general can not enjoin issue of railway-aid bonds, 1554.
    - counsel fees, where regular attorney acts for, 1688.
- # MUNICIPAL TAXES (see TAXES),
- injunctions concerning, 536-560.
- # MUSICAL COMPOSITIONS (see COPYRIGHT),
- injunctions concerning, 1053-1056.

THE REFERENCES ARE TO THE SECTIONS.

## N.

## NATIONAL BANK,

- sale under deed of trust to, enjoined, 457.
- tax on shares of, when enjoined, 507.
- loans by, on negotiable paper, not enjoined, 1202.

## NEGATIVE CONTRACTS. (See CONTRACTS.)

## NEGLIGENCE,

- of owner of franchise bars relief, 900.
  - in bridge, 922.
  - ferry, 929.
- of shareholder bars relief, 1206.
- by commissioners in doing of authorized act, 1309.

## NEW TRIAL,

- bill for, and for injunction, 115-117.

## NOTES. (See PROMISSORY NOTES.)

## NOTICE,

- of granting injunction, what sufficient, 17.
- of increase of tax as ground for injunction, 495.
- of easement, purchaser bound, 894.
- of restrictive covenant, bound by, 1152.
- by corporation, of covenant in restraint of trade, 1171.
- injunction against corporation rarely granted without, 1185.
- removal from club without, 1194, n.
- by shareholder, when judgment against corporation binding on, 1218.
- failure to give, of organization of medical board, 1329.
- of injunction, defendant's liability fixed when shown, 1421.
- actual, though unofficial, sufficient, 1422.
  - illustrations, 1423.
- by telegraph; reading in presence of; service on clerk, 1424.
- officer proceeding after, trespasser *ab initio*, 1444.
- of application for writ when required, want of not waived by motion to dissolve, 1489.
- of application, 1578, 1579, 1580.
  - federal practice; must be reasonable time, 1578.
  - effect of appearance, 1579, n.
  - must be given to obtain relief on amended bill, after dissolution, 1593.
- defendant against whom relief prayed by amendment entitled to, 1596.
- of motion to dissolve, 1600.
  - court judge of reasonableness of, 1600.
  - when answer excluded on, 1601.

## THE REFERENCES ARE TO THE SECTIONS.

NOTICE — *Continued.*

- admission of affidavits on, 1603.
- in support of answer, 1604.
- continuance of, 1611.

## NUISANCE,

- by tenant, when enjoined, 435.
- construction of railroad not a, 602.
- trespass ripening into, enjoined, 715.
- grounds of the jurisdiction, 739-758.
  - foundation of the relief, 739.
  - distinction between trespass and nuisance, 739.
- right should be established at law, 740.
  - relief refused when right doubtful, 740.
- injury should be irreparable, 740.
- when right sufficiently established at law, 741.
  - not when action pending on writ of review, 741.
- where injury is not *per se*, relief refused, 742.
  - illustrations, 742.
- when benefit to public, relief refused, 742.
- complainant must show illegality of act, 742.
- uncertainty a bar to relief, 743.
  - motion for interlocutory injunction not retained; bill dismissed without prejudice, 743.
- when evidence of fact conflicting, injunction *in limine* refused, 744.
- remedy at law a bar to injunction, 745.
  - when municipal authorities can abate, 745.
  - when title in dispute, 745.
  - criminal punishment no bar, 745.
- considerations arising from difficulty of abating, 746.
- prohibition of business by municipal authorities, 747.
  - decision that trade is nuisance not reviewed, 747.
- relief limited to cases of nuisance *per se*, 748.
- court will not enjoin erection of structures prohibited by ordinance, 748.
- abatement by unauthorized commissioners enjoined, 748.
- injunction and abatement do not follow recovery of damages as of course, 749.
  - finding necessary to enjoin overflow from dam, 749.
- construction of ditch not enjoined when provision for assessment of damages, 750.
- drawing off surface water, 751, 809.
- lawful business not enjoined, 752.
  - coal smoke from production of iron, 752.

THE REFERENCES ARE TO THE SECTIONS.

**NUISANCE** — *Continued.*

- where defendant is removing, relief refused, 752.
- criminal liability no bar to relief, 752.
- removing lateral support, 753, 852.
- burning wooded lands, 754.
- interference with exclusive right to slaughter enjoined, 755.
- acquiescence a bar to relief, 756.
- effect of compromise and release, 756.
- when grievance common to several they may unite, 757.
  - when no private injury suffered, 757.
- when proof supports allegations, injunction perpetuated, 758.3.
- when injunction made mandatory, 758.
- public nuisances, 759-771.
  - purpresture defined, 759.
  - erection of pier in harbor restrained, 760.
  - obstruction of river by wharf enjoined, 760.
    - not when no nuisance, 760.
  - when doubtful whether act purpresture, relief refused, 760.
  - cutting embankments of public canal restrained, 760.
  - relief refused when remedy at law, 761.
    - unless special injury suffered, 761.
  - private persons must show special injury to enjoin, 762.
    - closing up of public street, 763, 818.
    - filling up dock, 763.
    - erection of elevator, 763.
    - laying street railway, 763.
  - when act prohibited, people need not show injury, 764.
    - citizen must, 764, 828.
  - floating elevator not enjoined, 765.
  - obstruction of river by dam, enjoined, 766.
    - when authorized by legislature, 766.
  - legislative sanction a bar to relief, 767.
  - obstruction of river in city, enjoined, 768.
    - public square, 768.
  - violation of private right necessary, 769.
  - when stream not navigated, relief refused, 770.
  - pendency of criminal proceedings no bar, 770.
  - people may enjoin back water from dam, 770.
  - adverse user no bar to relief, 771.
- to dwellings, injunctions against, 772-793.
  - general rule, 772.
    - loss of health and business, 773.
      - chandlery, slaughter-house, 773.
      - offensive noises, smoke, or odors, 773, 774.
      - other illustrations, 773.

## THE REFERENCES ARE TO THE SECTIONS.

NUISANCE -- *Continued.*

- actual damage must be shown, 774.
  - scientific evidence, weight of, 774, n.
- other considerations governing court, 774.
- from cattle yard, enjoined, 775.
- manufacture of gas enjoined, 775.
- powder house, erection of, enjoined, 776.
  - not when indispensable, 776.
- burning of brick enjoined, 777.
- forging iron, 777.
  - not refused because complainants own similar establishments, 777.
- storing of inflammable material enjoined, 777.
- rifle range, use of enjoined, 777.
- soot; smelting works; engine house; garbage, 777.
- collection of crowd enjoined, 778.
  - noise from circus ground for relief, 778.
- ringing of bells enjoined, 779.
- use of premises for extraordinary purpose, 780.
  - stables, 780.
  - privy on common property, 780.
- erection of urinal not enjoined when legal, 780.
- does act complained of produce actual discomfort, 781.
  - noise from machinery, 781.
- houses of ill-fame, 782.
- wrongful use of party walls enjoined, 783.
  - when roof projects over defendant's land, 783.
- offensive noise and odors, 784.
  - old iron and rags, 784.
- where state practice allows recovery of damages as well as injunction, 784.
- when act not nuisance in law, depreciation of value no ground for relief, 785.
  - school house, 785.
- effect of laches as a bar to relief, 786.
- mill not a nuisance *per se*, 787.
  - cautiously interfered with, 787.
  - use of proper appliances, 787.
- planing mill not enjoined when question of nuisance doubtful, 788.
  - increased risk of fire, 788.
- manufacture of felt roofing; facts showing injury must be stated, 788.
- when injury to use and value, remedy at law, 789.

## THE REFERENCES ARE TO THE SECTIONS.

NUISANCE — *Continued.*

- erection of jail not enjoined, 789.
- where answer admits facts, but denies conclusion, injunction not dissolved, 790.
  - when *prima facie* case not made by bill and answer, dissolved, 790.
  - facts must show probability of, 790.
- when injury irreparable, 791.
  - erection of mill near track, 791.
- should bill show establishment of right at law, 791.
- changing character of premises, 792.
  - when party wall should be solid, relief granted against windows, 792.
- injunction will be made mandatory, 792.
- burial ground not enjoined, 792 *a*.
- joinder of plaintiffs, American and English rule, 793.
- owner and licensee proper parties defendant, 793.
- nuisances to water, 794-815.
  - foundation of the relief, 794.
    - riparian proprietor has interest which equity will protect, 794.
  - extent of injury doubtful and irreparable injury, 795.
  - diversion of water enjoined, 795.
  - floating logs down non-navigable stream enjoined, 795.
  - complainant's right must be established, 796.
    - want of, ground for demurrer, 796.
  - diversion of water from mills, enjoined, 796.
  - artificial channel which more directly drains, not enjoined, 796.
  - relief refused when works erected without objection, 797.
  - quality as well as quantity of water protected, 798.
    - injury to health or comfort, 798.
    - fouling of, so as to unfit for dyeing purposes, 798.
  - past injuries, when no danger of future, no ground for relief, 798.
  - prescriptive use bar to relief, 799.
    - right limited by actual enjoyment, 799, 800.
  - where use simply a loan, relief withheld, 800.
  - subterranean streams, no correlative rights in, 801.
    - when drainage from cemetery injures, 801.
    - when well injures spring formed by percolations, not enjoined, 801, 876.
- construction of levee may be enjoined, 802.
  - when injury from, seems irreparable, equity has jurisdiction, 802.

THE REFERENCES ARE TO THE SECTIONS.

NUISANCE — *Continued.*

- United States may enjoin injuries to public improvements, 803.
  - not when fact of injury mere opinion, 803, 1324.
- United States department officers may be enjoined, 803, n.
  - enjoined when equity has jurisdiction of person, 803.
    - contra*, 803, n.
- injury to canal, 804.
- mandatory injunction granted against continuance of, 804.
  - to compel restoration of proper channel, 804.
  - to fill up ditch, 804.
- discharge from mines enjoined, 805.
- when relief allowed between tenants in common, 806.
  - one enjoined from diverting water to private mill, 806.
  - right to alternate use protected, 806.
- waste of water supplying mill enjoined, 807.
  - not when injury small, 807.
- restrictions upon the relief, 808.
- interference with city drain enjoined, 809.
- municipality enjoined from overflowing lands, 809.
- pollution of stream by sewage enjoined, 810.
  - whether inconvenience to defendants considered, 810, n.
  - when injury problematical and denied, relief refused, 811.
- riparian owner may enjoin obstruction to river, 812, 813.
  - when erection of wharves and piers enjoined, 812.
  - owner of piers and booms may enjoin obstruction, 814.
  - court will not enjoin erection of any boom whatever, 814.
- relief refused against railway until determination of power to do acts, 814.
- regatta enjoined by owner of exclusive right to fish, 815.
- drainage into trout-pond enjoined, 815.
- to streets and highways, 816-825.
  - obstruction to, may be enjoined, 816.
  - special injury must be shown, 816.
    - erection of house on, enjoined, 816.
  - will interfere before completion to prevent multiplicity of suits, 817.
  - irreparable injury must be shown, 817.
  - when act not nuisance *per se*, question must be determined by jury, 817.
  - supervisor of highway, as such, can not enjoin, 817.
  - several lot owners may enjoin closing up of, 818.
    - what sufficient allegations of injury, 818.

## THE REFERENCES ARE TO THE SECTIONS.

NUISANCE — *Continued.*

unnecessary diversion by railway enjoined, 819.

municipality may enjoin, 819.

owner of toll-bridge may enjoin injury to highway, 820.

relief refused when highway abandoned, 821.

delay by attorney-general and relator bars relief, 821.

taking up pavements not enjoined, 822.

legal remedy a bar, 823.

relief refused when surveyor can remove, 823.

projection in building not enjoined unless substantial injury shown, 824.

discharge of sewage of one municipality into sewers of another enjoined, 825.

time granted to construct suitable works, 825.

telegraph and telephone lines, when enjoined, 825 *a*.

railways, 826-832.

people may enjoin construction of, through streets, 826.

city in corporate character can not, 826.

when authorized by council, not enjoined, 826.

plaintiff must show special injury, 827.

street railway, 827.

construction of railway in city not a nuisance *per se*, 828.

general averment not sufficient, 828.

where particular construction authorized relief refused, 828.

authorized construction of street railway not a nuisance *per se*, 829.

one can not enjoin another without special injury, 829.

injunction conditioned on condemnation proceedings, 830.

opening street through embankment after twenty years user, enjoined, 831.

construction of road for individual benefit enjoined, 832.

bridges, 833-838.

erection of bridge over navigable river enjoined, 833.

Supreme Court of United States will give relief to state, 833.

relief refused to city, 833, *n*.

when authorized, riparian owner can not enjoin, 833.

relief refused when right doubtful and injury not irreparable, 833.

when question of nuisance doubtful temporary injunction granted, 834.

unauthorized erection of, public nuisance, 834.

riparian owner may enjoin, 834, 836.



THE REFERENCES ARE TO THE SECTIONS.

NUISANCE — *Continued.*

- when construction authorized, relief refused, 835.
- relief refused when no injury to navigation, 835.
- when plaintiff suffers no special injury, relief refused, 836.
- acquiescence a bar to relief, 837.
  - even as against the public, 837.
- laying tramway over bridge enjoined, 838.
- mill-dams, 839-847.
  - injury caused by back flowage from, ground for relief, 839.
  - relief granted against destruction of, 839.
  - value of property not a test, 840.
  - right need not be established at law, 840.
    - unless disputed or doubtful, 840.
  - rebuilding enjoined, when stagnant water caused by, 841.
    - not when mischief can be remedied, 841, n.
  - destruction of without trial or notice, enjoined, 841.
  - dissolution ordered, when resulting loss can be repaired, 842.
  - general allegation of irreparable mischief not sufficient, 842.
  - when old dam too high, rebuilding at all not enjoined, 842.
  - erection of dam prohibited by law enjoined, 843.
    - improvement company whose tolls are injured may enjoin, 843.
- illustrations of the relief, 844, 845.
- preliminary injunction should not alter condition of dam, 845.
- writ for removal of dam not enjoined, 846.
- adverse user a bar to relief, 847.
- laches of plaintiff bars relief, 847.
- jurisdiction in cases of and franchises similar, 899.
- act prohibited by lease need not be, 1146.
- school house not a, 1156.
- bank not a, 1188.
- ordinances concerning, 1248.
- dissolution of injunction against, 1603.

## O.

- OFFICERS (see CORPORATIONS: MUNICIPAL CORPORATIONS; TAXES),
  - of church, when enjoined, 314.
  - of government, not enjoined from removing barracks, 350.
  - omission of, to qualify, as ground for enjoining tax, 501.
  - of municipality, not enjoined when legally abating nuisance, 747.
- illegal issue of stock to, enjoined, 1190.

THE REFERENCES ARE TO THE SECTIONS.

OFFICERS — *Continued.*

- receiver may enjoin officers of corporation from collection of debts, 1197.
- purchase by president of corporate indebtedness, 1201.
- of corporation, not restrained from exercise of functions, 1210.
- election of, in private corporation, 1230-1235.
- discretion of municipal, not interfered with, 1240.
- of county, not enjoined because of illegal county organization, 1249.
- title of municipal, not determined in equity, 1256.
- removal of county offices by, 1257, 1258.
- improper application to parliament by, 1259.
- de facto* of railway, no ground for enjoining delivery of bonds, 1290.
- municipal, proper defendants in enjoining bonds, 1298.
- of injunctions against public officers, 1308-1329.
  - general doctrine stated, 1308.
  - appropriation of private property by commissioners enjoined, 1308.
  - relief allowed where authority exceeded, 1309, 1311.
  - negligence in doing authorized act, 1309.
  - violation of official duty ground for relief, 1310.
  - relation to relief by *mandamus*, 1310.
  - issuance of bond in violation of compromise, 1310.
  - action of official boards not reviewed in equity, 1311.
  - fraud and irreparable injury, 1311.
  - title not determined in equity, 1312.
  - temporary injunction granted *pendente lite* dissolved, 1312.
  - remedy by *quo warranto* a bar, 1312.
  - when answer denies equity of bill, 1312.
  - restoration to office not affected by, 1312.
  - two common councils of city, 1312, n.
  - filling vacancy; use of certificate; appointment of successor, 1313.
  - payment of salary and fees to incumbent not enjoined, 1314.
  - possession of *de facto* officer protected, 1315.
    - of school district, 1315.
    - no question of title determined, 1315.
  - can equity enjoin an election, 1316.
    - mere volunteer can not, 1316.
- injunction will not prevent act commanded by *mandamus*, 1317.

## THE REFERENCES ARE TO THE SECTIONS.

OFFICERS — *Continued.*

- act prohibited by injunction bar to *mandamus*, 1317.
- possible remedy at law does not bar relief, 1318.
  - opening road across railway, 1318.
- creation of new county when illegal, enjoined, 1319.
  - when already created, 1319.
- drainage commissioners enjoined when exceeding power, 1320.
- residents and tax payers proper parties, 1321.
- irreparable injury must be shown, 1321.
- removal of county offices, 1321.
- state courts will not enjoin United States officers, 1322.
- revenue officers not enjoined on mere fears of injury, 1322.
- President of United States not enjoined, 1323.
- where injury to stream mere opinion, relief refused, 1324.
- United States department officers enjoined, 1324.
- of state, not enjoined from taking property when mode for compensation provided, 1325.
- sheriff not enjoined when aid will be given to oppressive proceeding at law, 1325.
  - executive, when enjoined, 1326.
  - execution against defaulting officer of railway, 1326.
  - state, not enjoined from enforcing laws, 1326.
    - public loan, 1326.
    - text-book contract, 1326, n.
- state must show threats to act under unconstitutional law, 1327.
- injunction not issued in aid of *mandamus*, 1328.
- payment of money pending contest, 1328.
- effect of failure to give notice of organization of medical board, 1329.
- reading injunction to president in presence of other officers, 1424.
- should obey the law, and not the writ, 1425, n.
- proceeding with sale after notice of writ trespasser *ab initio*, 1444.
- injunction dissolved when corporation answers though officers do not, 1534.
- of court, when necessary parties in bill to enjoin sale, 1551.

## OFF-SETS. (See SET-OFFS.)

## ORDINANCE (see MUNICIPAL CORPORATIONS),

- erection of buildings prohibited by, not enjoined, 748.
- passage of, not enjoined, but acts done under them may be, 1243.
- validity of, determinable at law, 1244.

## THE REFERENCES ARE TO THE SECTIONS.

ORDINANCE—*Continued.*

- for landing of boats at public wharf, not enjoined, 1245.
- concerning public improvements not enjoined; gas works, 1246.
- taking all of sidewalk on one side of street, 1247.
- vacating street without necessary consent, 1247.
- entirely void, 1247.
- concerning nuisances, 1248.
  - pressed hay, 1248, n.
- want of petition for improvements ground for relief, 1271.
- tax payers may enjoin, 1298.

## P.

## PARTIES,

- in enjoining actions at law, 57.
  - in equity, 58.
- to bill to enjoin judgment, 132, 153, 195.
  - interference with church property, 316.
  - sale under deed of trust, 446.
- joinder of, to enjoin tax, 573-577.
- tenant for life can not join with remainder-man to restrain removal of coal, 664.
- in injunctions against waste, 686-696.
- state may enjoin interference with exclusive right to slaughter, 755.
- when injury from nuisance common to several, all may join, 757.
- one co-tenant can not enjoin saloon without special injury, 757.
- attorney-general may enjoin erection of pier, 760.
- plaintiff in injunctions against nuisances to dwellings, 793.
- owner and licensee proper parties defendant, 793.
- supervisor of highways, as such, can not enjoin obstructions to highway, 817.
- several lot owners may join to enjoin closing up of street, 818.
- municipality may enjoin diversion of highway, 819.
- owner of toll-bridge may enjoin injury to, 820.
- improvement company may enjoin erection of dam, 843.
- adjacent lot owner may enjoin injury to public square, 855.
- mill owners in severalty may join to restrain diversion of water, 880.
- stockholder may enjoin fraudulent usurpation of franchise, 907.
- who proper to protect lottery franchise, 908.
- in patent suits, 979.
- in copyright cases, 1057-1063.

## THE REFERENCES ARE TO THE SECTIONS.

PARTIES — *Continued.*

- corporation necessary party to enjoin use of its name, 1081.
- in trade mark cases, 1102-1105.
- omission of corporation when relief sought against it, 1191.
- omission of party to whom sale is to be made, 1191.
- tax payer may enjoin illegal contract, 1199.
- in behalf of shareholders, 1203-1223.
- single shareholder entitled to relief, 1207.
- when private citizen may enjoin act *ultra vires*, 1224.
- plaintiff must be actual shareholder, 1228.
- county commissioners may enjoin payment of aid bonds, 1283.
  - state treasurer enjoined from issuing illegal bonds, 1294.
- in enjoining aid bonds, 1297.
- in actions affecting municipal corporations, 1298-1307.
- mere volunteer can not enjoin election, 1316.
- when wife not party in forcible entry against husband, of her property, 1388.
- people may bring action for contempt, 1449.
  - government counsel not necessary, 1449.
- answer of mere nominal, not required, 1529.
  - stakeholder, 1529.
  - party improperly joined, 1533.
- joinder of, general principles governing, 1547.
  - party must have an interest, 1547.
  - when party to action at law has none, 1547.
  - relief through equities of other, 1547.
- must usually be before the court, 1548.
  - when court has full possession of cause, may enjoin proceedings at law, 1548.
  - purchaser under decree enjoined, 1548.
  - necessity must be great to enjoin party not before court, 1549.
  - where all not served with process, 1549.
  - when common right of several affected, 1549.
  - separate violation of same right, 1549.
- injunctions against actions at law, 1550.
  - one not a party to, 1550.
  - at instigation of another, 1550.
- when officers of court necessary, 1551.
- injunctions against judgments, 1552.
  - fraudulently recovered against agent, principal may enjoin, 1552.

THE REFERENCES ARE TO THE SECTIONS.

**PARTIES — *Continued.***

introduction of new, in United States court, over whom  
court has no jurisdiction, 1552.

may issue stay order, 1552.

to enjoin violation of public easements, 1553.

test to be applied, 1553.

use of public square for private purposes, 1553.

lease of, by county commissioners, 1553.

where right a public one, attorney-general may enjoin, 1554.

can not enjoin issue of railway-aid bonds, 1554.

right of attorney-general to interfere with corporations, 1554, n.

corporate authorities of town proper, to enjoin public  
nuisance, 1555.

building in public square, 1555.

private persons specially injured may join, 1555.

legal or equitable interest a test, 1556.

state can not enjoin issue of bonds by county  
court, 1556.

to enjoin execution of resolutions of common  
council, 1556.

neither contractors nor lowest bidders need be  
joined, 1556.

tax payers of school district may enjoin judgment  
against, 1557.

joinder of, 1557.

religious bodies, 1558.

trustees proper parties, 1558.

state need not be a, 1558.

violation of burial ground, 1558.

against holder of legal title, 1558.

relief between principal and agent, 1559.

sale of chattels, 1559.

stock; money deposited to agent's account,  
1559, n.

tax payers as plaintiffs; how action should be brought,  
1560.

owner of state bond, 1561.

agent of foreign government not enjoined, 1562.

when bill multifarious relief refused, 1563.

omission of necessary party defendant, 1564.

corporation, whose members are joined, 1564.

non-resident tort-feasor, 1564.

on death of nominal, representative need not be made,  
1610.

## THE REFERENCES ARE TO THE SECTIONS.

**PARTIES** — *Continued.*

- objection of improper joinder, may be taken on motion to dissolve, 1613.
- rights of stranger to suit whose rights are affected by, 1617.
- damages to real, when nominal enjoined, 1682.

**PARTITION,**

- proceedings for, when enjoined, 335.
- purchaser under, can not enjoin sale under execution, 335.
- award for, not enjoined if invalid upon its face, 375.

**PARTNERS,**

- failure of consideration on sale between, 67.
- assignment of homestead to wife, not enjoined, 440.
- rights of, in firm name and trade mark, 1080.
- purely negative contracts between, enforced, 1166.
- assignee of securities given on dissolution enjoined from enforcing breach of covenant, 1183.
- principles governing the jurisdiction, 1330-1341.
  - general rule, 1330.
    - dissolution need not be sought, 1330.
    - removal of servants; exclusion from business; unwarranted use of property, 1330.
    - contract between papers to furnish news, 1330.
  - removal of books enjoined, 1331.
    - when books already removed, 1331.
  - when enforcement of judgment between partners enjoined, 1332.
  - violation of articles enjoined, 1333.
    - forming new partnership; writing plays for another theater, 1333.
  - enforcing judgment for individual debt, 1334.
    - general creditor can not enjoin, 1334.
  - exclusion from business, 1335.
  - warrant of attorney to confess judgment after injunction against meddling with assets, 1335.
  - nature of business and scope of authority considered, 1336.
  - sale of entire newspaper property enjoined, 1336.
  - rights of creditor by common law and statute, 1337.
  - pledging firm notes; disposal of chattels; action at law, 1338.
  - levy and sale of interest warrants injunction against purchase money, 1338.
  - holding one's self out as partner, enjoined, 1339.

## THE REFERENCES ARE TO THE SECTIONS.

PARTNERS — *Continued.*

- partner not enjoined from acting in that capacity, 1339.
- injunction dissolved when answer shows dissolution of firm, 1339.
- third person not enjoined from selling real estate, 1340.
- remedy provided by articles a bar, 1341.
- non-compliance with articles by plaintiff, 1341.
- dissolution of firm, 1342-1349.
  - relief pending action for dissolution, 1342.
    - collecting debts; negotiating bills of exchange, 1342.
    - where partner takes all and becomes insolvent, 1342.
  - agreements not to carry on business, enjoined, 1343.
  - urgent necessity must be shown, 1344.
    - insolvency; unprofitableness; ultimate loss, 1344.
  - use of firm name and good-will after dissolution, 1345.
    - bankruptcy of firm, 1345.
    - sale of good-will in insane hospital, 1345.
  - retiring partner can not announce discontinuance of periodical except as to himself, 1346.
  - part owner can not enjoin sailing of vessel, 1347.
  - violation of contract for dissolution enjoined, 1348.
  - publication of partnership letters enjoined, 1349.
- injunctions in connection with receivers, 1350-1359.
  - receiver usually appointed on dissolution, 1350.
  - facts must warrant dissolution, 1350.
  - where interlocutory injunction granted *ex parte*, 1350.
  - destruction of mutual confidence, ground for, 1351, 1353.
    - resolution to ruin business, 1351.
  - circumstances of each case govern, 1352.
  - not of course on dissolution and account, 1352.
  - sale of interest of one on execution, 1352.
  - insecurity of assets; insolvency, 1353.
  - injunction granted to prevent waste, pending application for receiver, 1354.
    - injunction auxiliary to, 1354.
  - failure to contribute portion and sale of interest, 1355.
  - attempt by insolvent partner to appropriate assets, 1355.
  - administrator allowed relief, 1356.
  - partnership in farm unprofitable, 1357.
  - violation of agreement to purchase logs of co-partner, 1357.



THE REFERENCES ARE TO THE SECTIONS.

PARTNERS — *Continued.*

- doubt whether property is firm property, and misconduct of defendant, 1358.
- receiver not enjoined from managing property, 1359.
- dissolution of injunction; admission of affidavits on motion for, 1603.

PARTY-WALLS,

- injunction concerning, 332.
- wrongful use of, enjoined, 783.
- windows in, when prohibited, enjoined, 792.
- removal of portion of, enjoined, 852.

PATENTS,

- nature and grounds of the jurisdiction, 934-952.
  - objects of the relief, 934.
    - granted only by United States courts, 934.
  - what protected, 934.
  - granting relief matter of discretion, 935.
    - court may impose conditions, 935.
  - establishing right at law, 936.
    - conditions imposed, 936.
      - jury trial, 936.
      - bond, 936.
      - recent patent, 936.
      - trial at law, 936.
- injunction preserves fights pending litigation, 937.
- relative convenience and inconvenience, 937.
- right and infringement must be clear, 938.
  - illustrations, 938.
- originality of, doubtful, injunction dissolved and account of sales decreed, 938.
- controversy as to right a bar to relief, 939.
- patent recent, infringement doubtful, relief refused on final hearing, 939.
  - action at law ordered and bill retained, 939.
- presumptions as to novelty necessary to warrant relief, 940, 941.
- acquiescence of public, 941, 942.
  - and exclusive possession, 941, 942.
  - anticipation of patent, 941.
- prior use of plaintiff's invention a bar, 943.
  - affidavit on information and belief, 943.
- theory of invention must be supported by affidavits, 944.
  - in England affidavit must show novelty, 944.
- on bill to procure repeal of, relief granted, 945.
  - not when bill filed after expiration, 945.

THE REFERENCES ARE TO THE SECTIONS.

**PATENTS — Continued.**

- death of defendant, 945.
- patentee not enjoined from bringing action, 946.
- when patented article can not be made without use of defendant's patent, 947.
- plea that defendant is salesman, no bar, 948.
- violation of injunction, 949.
- defendant can not determine what is covered by plaintiff's patent, 949.
- when difference between two machines not colorable, 949.
- property in article is in infringer, 950.
- master of vessel enjoined from using patented machinery, 951.
- effect of defendant's consent to injunction, 952.
- prior adjudications, effect of, 953-959.
  - general doctrine stated, 953.
  - when decided question arises as against a stranger, 954.
  - when validity established, relief granted, when no allegations of insolvency or irreparable injury, 954.
  - court will only examine question of infringement, 955.
  - verdict and judgment make *prima facie* case, 955.
  - extension and re-issue do not affect doctrine, 956.
    - except when doubt exists as to identity covered by, 956.
  - doctrine applies when judgment recovered by agreement, 957.
  - relief granted, though defendant is about taking further steps at law, 957.
  - doctrine applies to award, 957.
  - limitations on doctrine, 958.
  - granting of interlocutory injunction not an adjudication, 958.
  - effect of re-issue covering wider ground, 959.
- principles upon which relief is granted, 960-987.
  - court will not decide merits of a *bona fide* issue upon preliminary application, 960.
    - defendant's good faith, 960.
  - patent to defendant after infringement, 960.
  - effect of *ex parte* application to patent office, 960.
  - injunction not granted on patent alone, 961.
    - where failure at law, 961.
  - where patent soon expires, 961, 981.
  - inconvenience not considered when right established and violation clear, 962.
  - prima facie* infringement must be shown, 963.
  - when case clear relief not refused because patent recent, 963.
  - clear infringement required when patent not adjudicated, 964.
    - good faith of defendants when solvent, 964.

THE REFERENCES ARE TO THE SECTIONS.

PATENTS — *Continued.*

- effect of acquiescence, 965, 966.
  - illustrations, 965.
  - long litigation, 966.
  - delay of three months, 966.
  - where no long possession, relief granted after judgment at law, 966.
- defendant's pecuniary responsibility, 967.
- where defendant does not vend patented machine, 967.
- where injury is loss of royalty relief refused, 967.
- bond or security in lieu of injunction, 968.
  - making single machine for defendant's own use, 968.
  - not when right clear and infringement manifest, 968.
- plaintiff's prior possession and use considered, 969.
  - must be public use, 969.
- court will enjoin partial infringement, 969.
- denial of equity of bill, will not prevent court from examining case, 969.
- office of injunction in patent cases, 970.
- continued to allow trial at law, 970.
- rights of licensee, 971, 972.
  - enjoining licensee a breach of contract, 971.
  - when forfeiture of license provided for, 971, 972.
  - when injunction in full force, 972.
  - when violation by licensee made under misapprehension, 972.
  - when assignee using in manner warranted by license, 972.
- injunction dissolved when act licensed, 972.
- actual infringement not necessary, 973.
- experiments, 973.
- when machine a public convenience, deposit required, 974.
- effect of injury to third persons, 974.
- court must be satisfied of validity, novelty and infringement, 975.
- when infringement occurs after verdict, 976.
- promise by defendant not to infringe, 976.
- subsequent patent to defendant, 977.
  - what will warrant relief, 977.
- when novelty denied, refused until trial at law, 977.
- must appear that complainant is inventor, 978.
- proof required to dissolve, 978.
- parties, 979.
  - legal owner can not enjoin equitable, 979.
  - both should be joined, 979.

## THE REFERENCES ARE TO THE SECTIONS.

PATENTS — *Continued.*

- where act joint all should be joined, where separate, action is several, 979.
- directors, 979.
- assignor who still retains interest, 979.
- assignee, 979.
- owner of infringement and worker on enjoined, 979.
- association contributing to common fund, 979.
- jurisdiction of the person only necessary, 980.
- when defendant's residence and place of infringement are the same, 980.
- thing patented, not the product, protected, 980.
- selling in another's territory, 980.
- sale of machines manufactured before expiration of, enjoined, 981.
- assignee *pendente lite* enjoined, 981.
- delay in instituting action at law ground for dissolution, 982.
- court may require keeping of account, 982.
- injunction will be dissolved on security to account, 982.
- decree for injunction and reference not final, 982.
- effect of failure to mark patented articles, 983.
- not asking relief until final hearing, 983.
- process not patented may be protected, 984.
- secret obtained in violation of contract, 984, 1108.
- foreigners subject to jurisdiction, 985.
- violation of injunction, what is, 986.
- wilful, counsel fees imposed, 986.
- account not incidental to injunction, 987.
- patentee's description not a trade mark, 1073.
- falsely representing goods as patented, 1092.
- use of word "patent" in trade mark, 1092.
- giving of notice to terminate license to manufacture not enjoined, 1107.
- failure of patent constituting consideration of note, 1123.
- sale of, agreement not to sell in Europe, 1174.
- procuring purchase of, through another, allowable, 1448.
- defendant may show expiration of injunction, 1455.
- merits of, not considered in contempt proceedings, 1465.
- costs, when violation clear, but service defective, 1465.
- when disregard of writ not wilful, 1465.
- admissibility of evidence on dissolution of injunction, 1606.
- damages when sale of alleged, enjoined, 1681.

## PATENT FOR LANDS,

- issuing of, not enjoined, 377.

## THE REFERENCES ARE TO THE SECTIONS.

## PAYMENT,

- of judgment, as ground for enjoining, 123.
- of mortgage, ground for injunction, 445.
- of taxes, as ground for injunction, 512.
- of illegal dividends, enjoined, 1217.

## PENALTIES,

- multiplicity of suits for, enjoined, 63.
- in deed of trust, enjoined, 342.
- distinction between, and liquidated damages, 1139, 1140.

## PEOPLE,

- may enjoin erection of piers by foreign corporation, 710.
  - flow of back water, 770.
  - obstruction of street by railway, 826.
- may bring proceedings for contempt, 1449.
  - government counsel not a necessary party, 1449.

## PERJURY,

- no ground for enjoining judgment, 116, 269.

## PERPETUAL INJUNCTION,

- nature and effect of, 3.
- may be granted, though not prayed, 38.
- granted, though interlocutory injunction was improper, 41.
- against collection of purchase money, rarely granted, 406, 1545.
- against ejectment, when, 425.
- when void as to subsequent tax, 515.
- when error in injunction against opening streets, 586.
- will lie to prevent condemnation of part of railway, 611.
- granted when right to church property and violation established, 714.
- when granted against flowing claims, 733.
- granted when proof of nuisance supports bill, 758.
- granted against publication of play derived from plaintiff's book, 1017.
- refused against publication of extracts in critical works, 1051.
- awarded against infringement of trade mark, 1063.
  - when contract is usurious, 1116.
- granted against payment of salaries when city not a party, error, 1307.
- against husband's property to secure alimony, error, 1395.
- not granted on refusal to dissolve, 1478.
- purchaser with covenants not entitled to, 1545.
- error to grant on affidavits, 1576, 1591.
- not reversed because preliminary granted without notice, 1580.
- reversed when issued without hearing, 1580.
- when right to, must be submitted to jury, 1591.

## THE REFERENCES ARE TO THE SECTIONS.

**PERPETUAL INJUNCTION** — *Continued.*

special verdict, 1591.

error to grant, on condition of filing new bond, 1626.

**PERSONAL PROPERTY,**

injunction and receiver as to, 22.

bond for purchase money not enjoined, 80.

sale of, under execution against third person enjoined, 119, 184.

exempted, injunction against sale of, 122.

effect of injunction against sale of, 142.

sales of, not enjoined where remedy at law, 176, 177, 1412.

tax on, injunction refused against, 505.

allowed when tax paid, 505.

sale of, under municipal tax, not enjoined, 546.

contract to convey when specifically enforced, 1122.

when sufficient to pay debts, grantee allowed relief against sale of real property, 1367.

sale of wife's, by husband, enjoined, 1389.

receiver of, sureties in bond not liable for, 1646.

**PETITION,**

right of, when enjoined, 26.

for election, determination of sufficiency of, not reviewed, 1257, 1258.

want of, for public improvement, ground for relief, 1271.

injunction, when granted on, 1566.

modification, stranger to suit whose rights affected may petition for, 1617.

**PEW-HOLDERS,**

in church, can not enjoin running of cars on Sunday, 20.

may enjoin diversion of church property, 320.

may not enjoin trustees from rebuilding, 321.

**PLEA,**

granting relief before disposal of, 1584.

**PLEADINGS,**

bill should show primary equity, 7.

positive averments necessary, 34.

argumentative allegations insufficient, 34.

irreparable injury, how alleged, 34.

averments on information and belief, 35.

verification of bill, 36.

supplemental bill, relief on, 39.

second bill, when relief denied on, 40.

amended bill, principles governing, 41.

formal, in bankruptcy, not necessary for injunction, 302.

requisites of bill to enjoin trespass, 722.

## THE REFERENCES ARE TO THE SECTIONS.

PLEADINGS — *Continued.*

- how pirated parts of copyright to be designated, 1036.
- compliance with statutory conditions must be averred, 1044.
- to enjoin aid bonds, averment that defendants are officers necessary, 1288.

## POSSESSION (see REAL PROPERTY),

- injunction as affecting, 14.
- of real property, injunction in aid of, 354-366.
  - long and uninterrupted, protected, 363.
- of railroad, not interfered with by injunction, 601.
- court will not reinstate complainants, 715.
- coupled with title, protected against trespass, 726.
- must be coupled with franchise, 900.
- naked, not sufficient to enjoin grading of street, 1279.
- of *de facto* officers, protected, 1315.

## POWER,

- defective execution of, by administrator, relieved against, 1362.

## POWER OF SALE. (See DEEDS OF TRUST; MORTGAGES.)

## PRACTICE,

- when doubtful whether completed works will be nuisance, bill dismissed without prejudice, 743.
- bond taken in lieu of injunction in patent cases, 968.
- enjoining creditors on motion to show cause for dissolution of corporation, 1195.
- English and Irish, after decree for account of assets of deceased debtor, 1408, 1409.
- under codes, supplemental proceedings have superseded creditors' bills, 1410.
- on dissolving injunction against action at law, 1541.
  - discretion as to costs, 1541.
- practice in granting injunctions, 1565-1591.
  - largely regulated by statute, 1565.
  - injunction usually granted on bill, 1566.
    - petition, 1566.
    - motion, 1566.
    - tenant under receiver, 1566.
    - to enjoin waste, in lunacy proceedings, 1566, n.
- proper verification of bill, 1567.
  - where on information, affidavit of person having knowledge necessary, 1567.
  - creditor's bill, 1567.
    - recovery of judgment and return of execution, 1567.

THE REFERENCES ARE TO THE SECTIONS.

PRACTICE — *Continued.*

- may be by attorney, 1567.
- agent with knowledge may verify, 1567.
- verification by next friend of married woman, 1567.
  - by corporation, 1568.
- nature and requisites of affidavits, 1569.
- information by attorney-general, 1570.
  - may call for answer under oath, 1570.
  - must be verified by affidavit, 1570.
- bill on information and belief with notice, demurrer filed, 1571.
- verification, when dispensed with, 1572.
  - matters of record, private instruments, 1572.
- failure to produce instrument on which bill is founded, 1572, 1575.
- transcript of judgment should be annexed, 1572.
- prayer for injunction, 1573.
- interlocutory injunctions usually granted on bill alone, 1574.
- motion may be made at any time before decree, 1574.
- effect of answer, 1574.
- all material facts must be presented in the bill, 1575.
- admission of affidavits in support of bill, 1576.
  - can not contradict answer on questions of title, 1576, 1603.
  - error to grant perpetual, on, 1576.
- admission of affidavits in opposition to motion, 1577.
  - effect of answer, 1577.
  - defendant need not answer, 1577.
  - may introduce any legal evidence, 1577.
- notice of application, 1578.
  - federal practice, 1578.
    - must be within reasonable time, 1578.
  - emergency must be pressing to grant relief without, 1579.
  - motion not heard at time fixed, 1579.
    - supplemental bill, 1579.
      - when granted on, to prevent irreparable injury, rule to show cause issued, 1579.
    - effect of appearance, 1579, n.
  - rule requiring notice after answer may be dispensed with, 1580.
  - perpetual injunction not reversed because preliminary issued without notice, 1580.
  - when no hearing had, 1580.



THE REFERENCES ARE TO THE SECTIONS.

**PRACTICE**—*Continued.*

- court may refuse relief on inspection of bill, 1580.
- positive allegations of fact necessary, 1581.
- irreparable injury, question for court, 1581.
- form of writ; writ broader than prayer, 1582.
- bill filed after injunction ordered, 1583.
- where demurrer sustained to original bill and amended bill not filed, 1583.
- English and American practice as to time of granting, 1584.
  - where plea interposed, 1584.
  - demurrer before answer, 1584.
  - on Sunday, 1584
- supplemental bill, 1585.
  - should be under oath, 1585.
- second motion for relief, 1586.
- motion for renewal after dissolution, 1586, n.
- refusal on final hearing a bar, 1586.
- waiver of answer under oath, 1587.
  - when sworn, use as affidavit, 1587.
- scandal in bill must be expunged, 1588.
- irregularity in service, 1589.
- bill must allege threats to do or doing of acts, 1589.
- retaining injunction to hearing, 1590.
- existing injunction not dissolved on hearing of another motion, 1590.
- when right to perpetual injunction must be submitted to jury, 1591.
- amendments, 1592-1598.
  - general rule, 1592.
    - after motion to dissolve, 1592.
    - may cure defect in original bill, 1592.
    - after answer, 1592.
  - after dissolution, 1593.
    - relief not granted *ex parte* on, 1593.
  - without prejudice to injunction, 1594.
  - after demurrer filed, 1594.
  - manner of amending sworn bill, 1594.
  - when amendment is new bill, dissolution granted on previous motion, 1595.
  - supplemental bill can not cure original bill, 1595.
  - by prayer for relief against another defendant, 1596.
  - notice, 1596.
  - Irish practice after answer, 1597.
  - by omitting non-resident defendant, 1598.

## THE REFERENCES ARE TO THE SECTIONS.

PRACTICE — *Continued.*

- in dissolving injunctions, 1599-1618.
  - when motion for entertained, 1599.
  - notice of motion to dissolve, 1600.
    - sufficiency of, 1600.
    - answer filed after, excluded, 1601.
    - of one purporting to be of both, 1601.
  - pendency of exceptions to answer, 1602.
  - admission of affidavits on motion to dissolve, 1603.
    - irreparable injury; waste or nuisance, 1603.
    - in partnership matter, 1603.
  - affidavits not allowed to take place of answer, 1604.
  - introduction of affidavits in support of answer, 1604.
  - depositions taken on due notice, 1604.
  - effect of answer, 1604.
  - distinction between common and special injunctions, 1605.
  - admissibility of evidence in patent cases, 1606.
  - new matter in affidavits, 1607.
  - affidavits showing that officer was deceived, 1607.
  - filing affidavits before or after answer, 1607.
  - failure to approve security in injunction bond, 1608.
  - on death of complainant, 1609.
    - defendant, 1610.
    - nominal parties, 1610.
    - answer drawn up before death, 1610.
  - continuance of motion, 1611.
  - effect of sworn answer, 1612.
  - answer entitled to as much credit as bill, 1612.
  - multifariousness of bill, 1613.
  - improper joinder of parties, 1613.
  - defective verification not supplied on motion to dissolve, 1614.
    - neglect to sign jurat, 1614.
  - objections to affidavit must be taken in court below, 1614.
  - practice in discharging injunction irregularly obtained, 1615.
  - filing of answer waives error in refusal of dissolution, 1615.
  - rule  *nisi* , English practice, 1616.
  - plea instead of answer, 1616.
  - allowance of plea to bill, 1616.
  - stranger to suit whose rights are affected, rights of, 1617.

## THE REFERENCES ARE TO THE SECTIONS.

PRACTICE — *Continued.*

dismissal of bill where cause not formally set for final hearing, 1618.

of the injunction bond, 1619-1634.

sureties to bond, 1635, 1647.

right of action, 1648-1656.

assessment of damages, 1657-1662.

damages, 1663-1684.

counsel fees, 1685-1692.

## PRESCRIPTION,

easement founded on, entitled to protection, 849, 862, 871, 872, 888.

no easement by, in ancient lights in United States, 868.

## PRIVATE CORPORATION. (See CORPORATIONS.)

## PROBATE COURT,

proceedings in, not enjoined, 50.

taking out letters of administration, not enjoined, 51.

mistake in allowance of claim by, 218.

## PROCESS,

false return of service of, 222.

want of service of, judgment enjoined, 229.

note extorted by abuse of, enjoined, 1126.

omission of prayer for writ in prayer for, 1482, 1573.

when all not served with, 1549.

court may entertain motion to dissolve without service of, 1599.

bond extends to all defendants, though not served, 1621.

defendant entitled to damages, although not served with, 1677.

## PROHIBITION,

against granting injunction, 43.

to test legality of county organization,  
1249.

## PROMISSORY NOTES,

suits on, injunctions against, 47.

enjoined to prevent multiplicity, 63.

for failure or want of consideration, 66, 67.

not enjoined because of maker's insolvency, 82.

payment not credited, 89.

failure of consideration as ground for enjoining judgment on,  
134, 178.

rights of accommodation indorser, 134.

judgment on, enjoined to protect indorser, 155.

misrepresentation as to consideration of, 187, 193.

assignee of, for value, protected, 187.

judgment upon paid note, when enjoined, 200.

THE REFERENCES ARE TO THE SECTIONS.

PROMISSORY NOTES — *Continued.*

- defense to, prevented by fraud, 200.
- fraud in obtaining surety to, 201.
- judgments on, enjoined for accident, mistake or surprise, 209.
- assignee of, how affected by ignorance, 223.
- for gaming, judgment not enjoined, 236.
- for purchase money, when judgment enjoined, 387.
  - collection enjoined, 399.
- injunctions against negotiation and collection of, 1123-1133.
- failure of consideration of, administrator may enjoin, 1369.
- sureties, 1375-1386.
- failure to produce, on which bill is founded, 1572.
- damages on dissolving injunction against suit on, 1672.

PROSPECTUS,

- unauthorized publication of one's name in, enjoined, 1091.

PUBLICATION,

- of dramatic compositions, 1038-1052.
- covenants against, enforced, 1181.
- of partnership letters, enjoined, 1349.

PUBLIC IMPROVEMENTS,

- works of, cautiously enjoined, 615, 833, 1185.

PUBLIC NUISANCE (see NUISANCE),

- corporate authorities of town may enjoin, 1555.
- private person specially injured may join, 1555.

PUBLIC OFFICERS. (See OFFICERS.)

PUBLIC RIGHTS,

- when protected by injunction, 16.
- attorney-general can enjoin violation of, 1303, 1304, 1554.

PUBLIC SQUARE,

- use for which conveyed, protected, 855.
- sale of, enjoined, 1301.
- use of, for other purposes, enjoined, 1303, 1553.
- after purchase and tax levy, residue of payment not enjoined, 1303.
- leasing of, by county commissioners, 1553.
- corporate authorities of town may enjoin erection of buildings in, 1555.

PURCHASE MONEY,

- judgment for, when enjoined for failure of title, 250, 251.
- proceedings to recover back, when not enjoined, 348.
- collection of, on failure of title, 382-413.
  - conflicting authorities, 382, 1545.
- injunctions allowed on ground of fraud, 383.
- purchaser in possession under covenants denied relief, 384.

## THE REFERENCES ARE TO THE SECTIONS.

PURCHASE MONEY — *Continued.*

- defense at law a bar to relief, 385.
- breach of warranty, when no ground for, 385.
- vendor must have known of defect, 386.
- apprehensions of vendee insufficient, 386.
- injunction allowed when purchaser not in possession, 387.
- conditional sale, 387.
- outstanding incumbrances no ground for relief, 388.
- defect in title no ground for relief, 388.
- ejectment, effect of, on right to injunction, 389.
- no conveyance given when injunction allowed, 390.
  - when denied, 391.
- purchaser without warranty denied relief, 392.
  - purchases of hazard, 392.
- special covenants by vendee, effect of, 393.
- deficiency in amount, relief allowed, 394.
- entire failure as to part, 394.
- false representations by vendor, 394.
- opposing authorities considered, 395.
- purchaser allowed relief on defect of title, 396.
  - on failure of consideration, 397.
- Indiana doctrine, relief allowed, 398.
- effect of garnishee proceedings against purchaser, 399.
- vendor's insolvency, effect of, 400.
- judicial sales, defect of title, authorities unsettled, 401.
- effect of special agreements between vendor and vendee, 402.
- failure of vendor to procure outstanding title, 403.
  - relinquishment of dower, 403.
  - when injunction dissolved, 403.
- remedy at law inoperative, injunction allowed, 404.
  - non-residence of grantor, 404.
- burden on vendor seeking dissolution, 405.
- perpetual injunction rarely granted, 406.
- purchaser with knowledge of defect not allowed relief, 407.
- rescission of contract, whether necessary, 408.
  - authorities unsettled, 408.
- payment contingent on good title, injunction refused, 409.
- difficulty in obtaining title, no ground for relief, 410.
- damages for fraud not set off against purchase money, 411.
- recoupment for usury not allowed, 411.
- diligence on part of purchaser necessary, 412.
- when damages disallowed on dissolution, 413.
- levy and sale of partnership interest ground for relief against, 1338.

## THE REFERENCES ARE TO THE SECTIONS.

**PURCHASE MONEY** — *Continued.*

dissolution of injunction against judgment for, 1544, 1545.

purchaser with covenants not entitled to perpetual injunction, 1545.

**PURCHASER** (see **PURCHASE MONEY**),

of realty, not enjoined from taking possession under ejectment, 324.

under partition, can not enjoin sale under execution, 335.

at administrator's sale, rights of, as against heirs, 337.

when compelled to accept good title, 341.

sale under judgment against his vendor, relief denied, 368.

when allowed, 371.

when protected against cloud upon title, 377.

when may enjoin sale under execution against vendor, 379.

right to enjoin collection of purchase money on failure of title, 382-413.

averments necessary to enjoin sale under deed of trust, 460.

protected against mortgagee with notice, 469.

subject to mortgage, rights of, 472.

subsequent, with notice, must respect easements, 894.

of land *pendente lite*, effect, 911.

of plate of map enjoined from printing therefrom, 992.

bound by covenants in sale of realty, 1154-1159.

under decree, enjoined though not a party, 1548.

**PURPRESTURE** (see **NUISANCE**),

when enjoined by supreme court, 42.

public nuisances, 759-771.

unauthorized bridge over river a public nuisance, 834.

**Q.****QUO WARRANTO**,

pendency of proceedings in, no ground for relief against construction of railroad, 603.

condemnation proceedings, 644.

proper remedy to test usurpation of franchise, 907.

title to corporate offices, 1235, 1250.

franchise of municipality, 1249, 1261.

title to public office, 1312.

illustrations, 1313.

THE REFERENCES ARE TO THE SECTIONS.

## R.

## RAILROADS. (See RAILWAYS.)

## RAILWAYS,

- satisfaction of judgment out of personal property of, 140.
- holder of mortgage bonds of, when may enjoin judgment, 463.
- rolling stock of, tax on, not enjoined, 505.
- taxes upon, when enjoined, 523 *a*.
- property of, exempt from taxation, injunction allowed, 531, 532.
- remission of tax on, ground for enjoining, 533.
- right of way, when tax on enjoined, 548.
- aid tax to two in entirety, instead of separately, relief allowed, 562.
- fraudulent representations by, to secure aid, ground for injunction, 563.
- mistake of election clerk in certifying tax voted to, relief allowed, 563.
- tax payer silent during construction of, estopped, 564.
- effect of requiring petition for aid to, 565.
- regular consolidation of two, tax not enjoined against bonds held by innocent purchaser, 566.
- bonds issued in aid of, by *de facto* officers, not enjoined, 567.
  - tax not enjoined when no defense shown, 568.
  - nor when bonds valid and held *bona fide*, 569.
- when different counties proper defendants in action to enjoin tax, 577.
- when appeal by, vacates assessment, street crossing enjoined, 583.
- crossing by street not enjoined for failure to award damages, 583.
- laying of tracks of, on street, when enjoined, 589, 826, 827.
- when removal from highway of private track not enjoined, 593.
- when fee of streets in city, relief refused citizen, 594.
- laying road across tracks of, enjoined, 597.
- relative convenience and injury of, relief considered, 598.
- held to strict compliance with conditions, 599, 600.
- unauthorized extension of track by, ground for relief, 599, 915.
- conflict of canal company with paramount right of choice by, respected, 600.

THE REFERENCES ARE TO THE SECTIONS.

RAILWAYS — *Continued.*

- possession not interfered with by injunction, 601.
- construction of, not nuisance *per se*, 602, 828.
  - may be controlled to prevent irreparable injury, 602.
- change of route enjoined, when, 603.
  - relative convenience considered, 603.
- free passes, when issuance of enjoined, 604.
- consolidation of, with another, enjoined, 605.
- extension of, not enjoined, 605.
- mortgage bondholder not allowed injunction against transfer
  - when no injury will accrue, 606.
- when transfer of future acquired property enjoined, 606.
- when aid to another railway will be prevented, 606.
- right to build bridge over another railway protected, 607.
- grade crossings, 607.
- breach of contract between two, enjoined, 608.
- right in street not exclusive, injunction refused, 609.
- relief refused one street railway against another when no special injury, 609, 829.
- when right of street disputed, injunction *in limine* refused, 610.
- interlocutory injunction retained until hearing, 610.
- condemnation of part of street railway, when enjoined, 611.
- exclusive location, 611.
- abandoned location, 611.
- filling up canal by, enjoined, 612.
- excess of authority in authorizing street railway, 613.
- enjoined from planting trees, 614.
- enjoined from constructing levees, until compensation made, 614.
- public improvements cautiously enjoined, 615.
- refusal to deliver to consignee, when enjoined, 616.
- illegal exactions by, restrained, 616.
- use of wharves not given by mandatory injunction, 616.
- judgment creditors enjoined at suit of bondholders, 617.
- acquiescence of property owner a bar, 618.
- when interference with right of way enjoined, 619.
- obstruction by rival road enjoined, 620.
- required to keep bridge in proper condition, 621.
- when common council may control, people can not enjoin, 621.
- interchange of traffic, 621 *a*.
- unjust discrimination, 621 *a*.
- stock yards in connection with, 621 *a*.
- express facilities: sleeping cars; oil company, 621 *b*.
- condemnation for other company or for foreign purpose, 621 *c*.



THE REFERENCES ARE TO THE SECTIONS.

**RAILWAYS** — *Continued.*

- right of way, failure to compensate for, 622-648.
  - failure to compensate owner ground for relief, 622.
  - for non-compliance with statute, 622.
  - where statute under which compensation determined unconstitutional, 622.
    - illustrations of the rule, 623.
  - statutory remedy to be first exhausted, 624.
  - use of road after construction enjoined, 625.
    - by lessee enjoined, 625.
    - after second assessment enjoined, 626.
  - vendor's lien, when decreed, 627.
  - bill must aver threats to take possession, 628.
  - mere contest as to title, injunction denied, 629.
  - offer to deposit compensation, relief refused, 629.
  - construction of second track enjoined, 630.
    - first track not enjoined when remedy by ejectment, 630.
  - doctrine in West Virginia, 631.
  - contract bars relief, 632.
    - illustrations of the rule, 633.
  - possession taken under license, relief refused, 634.
  - may maintain a bill for specific performance, 634.
  - on submission to arbitrators, award must first be paid, 634.
  - where property owners own fee in streets, relief allowed, 635.
  - license by owner bars relief, 636.
  - property holders, not people, entitled to relief, 636.
  - avermment necessary that right to use of soil is claimed, 636.
  - where fee of street in municipality, owner can not enjoin, 637, 1274.
  - where new plan of construction adopted, injunction allowed, 638.
  - notice of meeting of commissioners necessary, 639.
  - construction of cattle gaps not enforced, 640.
  - taking of land not necessary to, enjoined, 641.
  - use of road by another company, when enjoined, 642.
  - laches and acquiescence a bar to relief, 643.
  - though promise to give is verbal, after construction relief refused, 643.
  - not enjoined from condemnation proceedings, 644, 645.
  - taking possession of right of way of one company, under fraudulent proceedings, enjoined, 645.
  - mill owners enjoined from flooding track, 646.
    - not regarded as a mandatory injunction, 646.

## THE REFERENCES ARE TO THE SECTIONS.

RAILWAYS — *Continued.*

- construction of track over abandoned road-bed not enjoined, 647.
- violation of contract with city enjoined, 648.
- erection by, of trestle-work, not enjoined when easily removed, 713.
- erection of mill too near track for repairing enjoined, 791.
- obstruction of stream by, not enjoined until determination of power, 814.
- when right to divert highway exercised without actual necessity, relief granted, 819.
- municipality proper party, 819.
- nuisances from, 826-832.
- diversion of water from mill by, enjoined, 874.
- easements in rights of way, 886-896.
- when grant to canal not exclusive, railway may cross, 902.
- franchises in roads and railways, 912-916.
- exclusive between terminal points protected, 914.
- consolidation not enjoined, 914.
- crossing of bridge of, free of toll, enjoined, 919.
- conveyance of passengers across river when right of bridge company doubtful, 921.
- appropriation of bridge to railway travel, 923.
- contract to construct railway in particular manner, 1107.
- violation of railway-operating contracts enjoined, 1111.
- where terminated by notice, relief refused, 1111.
- contract to hire complainant to operate, not enforced, 1162.
- discretion in locating road rarely interfered with, 1186.
- fraudulent organization of, not considered, 1188.
- officers of, not enjoined from acting, when receiver main relief sought, 1191.
- attorney-general can not interfere with directorship of, 1199.
- unauthorized purchase of stock in another, 1203, 1224.
- building of only small portion of road contemplated, 1205.
- acquiescence, 1205, 1229.
- acts *ultra vires*, 1224, 1229.
- acting as coal merchant; steam packet company, 1224.
- private person may enjoin, 1224.
- acquiescence in purchase of another, 1229.
- municipal-aid subscriptions, 1282-1297.
- illegal opening of road across, enjoined, 1318.
- contract creditor can not enjoin disposal of assets of, 1403.
- injunction against, operative against receivers appointed by federal court, 1428.

## THE REFERENCES ARE TO THE SECTIONS.

RAILWAYS — *Continued.*

- injunction against "any one acting in behalf of," president liable, though not named, 1442.
- permitting previous purchaser to take iron after injunction, 1447.
- dissolution of injunction against, when judgment for value of land reversed, 1476.
- taking illegal possession of property, 1546.
- attorney-general can not enjoin issuance by municipality of aid bonds, 1554.
- state can not enjoin issue by county court, 1556.
- tax payer to restrain delivery of bonds to, must sue for himself and all others, 1560.

## REAL PROPERTY (see CLOUD UPON TITLE; ECCLESIASTICAL MATTERS;

- EJECTMENT; MORTGAGES; SALES; TAXES; TITLE),
- actions of ejectment, when enjoined, 95-97.
- forcible entry and detainer, injunction against, 98.
- suit on bond for conveyance when vendor has no title, 99.
- foreclosure enjoined when mortgages paid, 99.
- contest between heirs and devisee under lost will, 100.
- confusion of boundaries, 100.
- bill to establish title, when not entertained, 101.
- proceedings by lessor to recover, 101.
- when title pending in equity, party enjoined from proceeding before justice, 102.
- sale of, not enjoined under execution against third person, 120.
- judgments affecting injunctions against, 245-264.
- of bankrupt, sale enjoined, 289.
- not enjoined, 290.
- of injunctions affecting, 323-441.
- general features of the relief, 323-353.
- courts of equity averse to interference, 323.
- purchasers not enjoined from taking possession under ejectment, 324.
- loss of deed no ground for relief, 324.
- sale not enjoined because of irregularity, 324.
- allegation of irreparable injury insufficient, 324.
- defense at law a bar to relief, 325.
- the rule applied to forcible detainer, 325.
- debtor not enjoined from disposing of, by creditor without judgment, 326.
- sale enjoined for loss of conveyance, 327.
- dedication to public use, sale enjoined, 328.
- injunction allowed pending contest as to mining property, 329.

THE REFERENCES ARE TO THE SECTIONS.

REAL PROPERTY — *Continued.*

- action to set aside fraudulent conveyance, injunction allowed, 329.
- questions of trust, 330.
  - power to sell lands, 330.
  - land conveyed for street, 330.
  - rights of creditors, 330.
- tenants for life and remainder-man, 331.
- removal of emblements in suit to enforce vendor's lien, 331.
- party-wall agreements, injunctions concerning, 332.
- transfer not enjoined when bill operates as *lis pendens*, 333.
- vendor not allowed to enjoin sale, 334.
- partition of, not enjoined, 335.
  - purchaser under, can not enjoin sale under judgment, 335.
- mechanic's lien suit not enjoined, 336.
- injunction denied pending proceeding for dower, 337.
- rights of purchaser at administrator's sale as against heirs, 337.
- effect of conveyance pending injunction, 338.
- relative rights of judgment creditors and devisees, 339.
  - devisees and tenant, 339.
  - legatee and executor, 339.
  - heir and judgment creditor, 339.
- writ of restitution not enjoined, 340.
- when purchaser compelled to accept good title, 341.
- vendor not enjoined from re-entry, 342.
- forfeiture in deed of trust enjoined, 342.
- vendor restrained from removing fruit trees and shrubbery, 343.
- confusion of boundaries, 343.
- relief as between tenants in common, 344.
- sale by judgment creditor, when enjoined, 345.
- commissioner in chancery enjoined, 346.
- decree for sale, injunction against, 346.
- sale for taxes, irregularities no ground for enjoining, 347.
- opening of streets, irregularities no ground for relief, 347.
- proceedings to recover back purchase money, 348.
- municipal corporation restrained from encroaching upon, 349.
- officers not enjoined from removal of barracks, 350.

## THE REFERENCES ARE TO THE SECTIONS.

REAL PROPERTY — *Continued.*

- land used for burial purposes, disinterment of bodies enjoined, 351.
- land used for school purposes, levy upon enjoined, 352.
- injunction against removing fixtures, effect of, 353.
- injunctions in aid of possession, 354-366.
  - equity averse to, 354.
  - the English doctrine, 354.
  - injunction not allowed when title in dispute, 355.
    - to restrain trespass, 355.
    - against proceedings to recover, 355.
    - against writ of restitution, 355.
  - allowed when rightful possession interrupted, 356.
    - when defense can not be made at law, 357.
  - allowed when one not a party to litigation, 357.
  - neglect to execute decree ground for mandatory injunction, 358.
  - one in possession without title can not enjoin writ of restitution, 359.
  - want of remedy at law must be shown, 359.
  - not allowed where remedy at law, 360.
  - fraudulent purchase at sheriff's sale, 361.
  - not allowed to correct irregularities, 362.
    - contest between heirs and devisee under lost will, 362.
  - long and uninterrupted possession protected, 363.
  - fraud in obtaining deeds ground for injunction, 364.
  - purchase under illegal sale, when tender unnecessary, 365.
  - rights of purchaser under judgment of United States courts, 365.
    - when defendant not enjoined from leasing, 366.
- judicial sales under execution against third person, 367-371.
  - injunction denied in absence of fraud, 367, 368.
  - affirmative injury must be shown, 368.
  - distinction between legal and equitable title, 369.
  - distinction between personal and real property, 370.
  - relief allowed when property held in trust, 371.
- cloud upon title, 372-381.
  - collection of purchase money on failure of title, 382-413.
- ejectment, injunctions concerning, 414-429.
- landlord and tenant, injunctions concerning, 430-437.
- homesteads, injunctions concerning, 438-441.

## THE REFERENCES ARE TO THE SECTIONS.

**REAL PROPERTY** — *Continued.*

- restrictive covenants in conveyances of, 1153.
  - purchaser, assignee and sub-lessee, 1154.
- third person not enjoined by partner from selling, 1340.
- dissolution of injunctions affecting, 1542-1546.
- damages on dissolving injunction affecting, 1673.

**RECEIVERS,**

- actions against, when enjoined, 73.
- of state court, as affected by proceedings in bankruptcy, 292.
- of church property, protected by injunction, 322.
- of mortgaged premises, when allowed, 464.
- tax on property in hands of, not enjoined, 535.
- appointed to protect vendor's lien on right of way, 627.
- entitled to enforce restrictive covenants in lease, 1148.
- main relief sought, officers not enjoined from acting, 1192.
- may enjoin suits against insolvent corporation, 1196.
- collection of debts by officers of corporation, when enjoined, 1197.
- judgment for unpaid subscriptions in favor of, 1218.
- interference with possession of, by municipality, 1264.
- may preserve good-will of partnership, 1345.
- of partnership, injunctions in connection with, 1350-1359.
- transfer of debtor's property enjoined when no receiver, where authorized by statute, 1410.
- can not obtain receiver of debtor's property assigned, unless fraud is shown, 1411.
- injunction against railway, operative against receivers appointed by federal court, 1428.
- violation of injunction served during application for, 1441.
- court may enjoin tenant of, by motion, 1566.
- sureties in bond not liable for misconduct of, 1646, 1664.

**RECORDER OF DEEDS,**

- enjoined from recording deed, 329, 375.

**RECOUPMENT,**

- for usury, not allowed against purchase money, 411.

**REDEMPTION.** (See **EQUITY OF REDEMPTION.**)**REFEREE,**

- injunction against, refused when remedy by appeal, 90.

**RELEASE,**

- of errors, by enjoining judgment, 128, 129.

**RELIGIOUS TRUSTS.** (See **ECCLESIASTICAL MATTERS.**)**REMAINDER-MAN AND REVERSIONER,**

- when entitled to enjoin sale of trust estate, 330.
- and tenant for life, rights of, 331.
- must show special damage to enjoin breach of covenant, 1141.

THE REFERENCES ARE TO THE SECTIONS.

## REMEDY AT LAW,

- a bar to relief by injunction, 28.
- statutory effect of, 29.
- objection, when taken in United States courts, 29.
- must be in same state, 29.
- must be plain and adequate, 30.
- does not mean every remedy, 30.
- bars injunction against suits, 89-94.
  - on ground of mistake, 218.
  - on void judgment, 230, 231.
  - in forcible detainer, 325.
  - in aid of possession, 360.
  - to prevent cloud upon title, 377.
  - against ejectment, 415.
    - mortgage sale, 473.
- effect of, on injunction against taxes, 485, 486, 488.
  - municipal taxes, 543, 552, 555.
  - no bar when equity already has jurisdiction, 552.
  - opening streets and highways, 579, 590, 592, 595.
- condemnation proceedings not enjoined because of, 644, 645.
- bar to injunction against trespass, 699, 713.
  - exceptions to rule, 700.
  - against nuisance, 745, 750, 761, 781.
- criminal proceeding no bar to relief against nuisance, 745, 752.
- bars injunction against obstruction to highway, 823.
- inadequacy of, ground for enjoining injury to franchise, 897, 908, 912.
- bars injunction to protect rights in ferry, 928.
  - granted when amended bill shows no, 928.
  - relief against breach of contract, 1107.
- when premises changed so as to make covenants inapplicable, left to, 1158.
- corporation not enjoined, when there is, 1185.
- election to membership in corporation not interfered with, 1193.
- by minority of shareholders no bar to relief, 1204, n.
- statutory regulations of corporate election not a, 1232.
- bars relief against municipality, 1242.
- to test validity of ordinances, 1243, 1244.
- failure to invoke against illegal municipal contract bars relief, 1260.
- title to corporate offices not determined in equity, 1285, 1312.
  - to municipal offices, 1256.
  - public offices, 1312, 1313.
  - payment of salary not enjoined, 1314.

THE REFERENCES ARE TO THE SECTIONS.

**REMEDY AT LAW** — *Continued.*

tax payer may enjoin act of public officer, 1321.  
none for violation of agreement not to carry on business after  
dissolution, 1343.

**REMOVAL OF CAUSE,**

when enjoined, 48.  
injunction in aid of, 110.  
violation of injunction, punished on, 1453.  
writ not dissolved by, 1502.

**RENT,**

payment by trustees to debtor, when enjoined, 330.  
non-payment of, ejectment not enjoined, 416.  
payment of, pending ejectment, not enjoined, 416.  
when mortgagor enjoined from receiving, 464.  
proper as damage on dissolution of injunction, 1673, 1683.

**REPLEVIN,**

judgment in, when enjoined, 139.  
surety in, when denied relief, 256.  
whether debtor's property must be exhausted, 1380.

**RES JUDICATA,**

when does not result from dismissal, 39.  
former injunction against tax, 510.  
effect of, in patent cases, 953-959.  
proceedings in England against principal, bar to proceedings  
here against agent, 1065.  
dismissal of contempt proceedings for want of affidavit, no bar  
to subsequent proceedings, 1452.  
dissolution for deceit, no bar to future application, 1474.  
or perpetuation as, 1501.  
renewal of application, after refusal, 1586.  
refusal of relief on final hearing, a bar, 1586.

**RESTITUTION.** (See WRIT OF RESTITUTION.)

**REVENUE LAWS,**

of United States, proceedings not enjoined, 81.  
tax, when enjoined, 580.

**RIGHT OF WAY** (see EASEMENTS; RAILWAYS),

easements in, 886-896.  
injunction against disturbance of co-existing right in soil, 1445.

**RIVER,**

obstruction of, when enjoined by supreme court, 42, 766.  
by wharf, enjoined, 760, 812.  
in city, 768.  
may be enjoined by riparian owner, 812, 813.  
owners of booms, 814.  
bridges, 833-838.  
drawing off water from, not enjoined, 877.



## THE REFERENCES ARE TO THE SECTIONS.

RIVER — *Continued.*

- obstruction of, by boom company, not enjoined, 905.
- rules governing courts in cases of exclusive right to navigate, 910.
- between two states, rival ferries on, 932.

## ROLLING STOCK. (See RAILWAYS.)

## S.

## SALE (see MORTGAGES),

- under execution against third person, 119, 120, 184.
- of property of tenant, when landlord may enjoin, 119.
- of real estate, not enjoined, 120.
- fraudulent, injunction refused to one claiming under, 120.
- of exempted property, injunction against, 122.
- under void judgment, 231.
- under execution, not enjoined when title in dispute, 253.
- by commissioner in chancery, enjoined, 257.
- under execution, not enjoined for excessive levy, 259.
  - financial stringency, 259.
- under fraudulent judgment, enjoined, 261.
- not enjoined for inaccuracies of description, 261.
- of buildings erected by debtor, 262.
- of farming utensils and crops, 262.
- as affected by voluntary assignment, 264.
- of real estate of bankrupt enjoined, 289.
  - not enjoined, 290.
- of bankrupt's property acquired after adjudication, enjoined, 296.
- of church property by trustees, not enjoined, 315.
- of real property, not enjoined for irregularities, 324.
  - enjoined for loss of conveyance, 327.
  - dedicated to public use, enjoined, 328.
  - affected by trust, when enjoined, 330.
  - not enjoined when bill operates as *lis pendens*, 333.
  - vendor denied injunction against, 334.
  - under execution, purchaser in partition can not enjoin, 335.
  - of crops by tenant in common, not enjoined, 344.
  - by judgment creditor, when enjoined, 345.
  - by commissioner in chancery, enjoined, 346.
  - decree for, anterior rights not inquired into in enjoining, 346.
  - for taxes, irregularities no ground for enjoining, 347.
- judicial, under execution against third person, 367-371.

## THE REFERENCES ARE TO THE SECTIONS.

SALE — *Continued.*

- cloud upon title, injunctions to prevent, 372-381.
- of real estate under execution, injunction refused because of carelessness in examining title, 378.
- under judgment against vendor, vendee may enjoin, 379.
- administrator, when denied injunction against, 380.
  - when enjoined from, 381.
- judicial, defect of title, authorities unsettled, 401.
- of homestead, injunctions concerning, 438-441.
- judicial, when purchaser at, entitled to enjoin waste, 658, 663.
- to satisfy fraudulent claims enjoined, 1366.
- second, by administrator *de bonis non*, enjoined, 1371.
- under power, injunction against, no bar to executors, 1373.
- of wife's property for husband's debt, enjoined, 1387.
- of husband's property to secure alimony, perpetual injunction against, error, 1395.
- under execution when conditions not complied with, 1429.
- officer proceeding with, after notice, trespasser *ab initio*, 1444.
- delivery under previous, after injunction, no sufficient excuse, 1447.
- when liability of land to, under execution doubtful, writ retained, 1543.
- judicial, when officers of court proper parties, 1551.
- fraudulent, by agent, ground for relief, 1559.
- of specific article, when enjoined, liability on bond, 1623, 1639.
- depreciation in value pending injunction against, proper damage, 1663.
- damages when sale of real estate enjoined, 1674.
  - alleged patented article enjoined, 1681.

## SCANDAL,

- in bill must be expunged, 1588.

## SCHOOLS,

- diversion of church property to, enjoined, 320.
- land used for, levy upon enjoined, 352.
- not a nuisance, 1156.
- illegal appropriation for, enjoined, 1238, 1299.
- misapplication of funds enjoined; removal of; erection of, in wrong place, 1263.
- use of, for other than school purposes, enjoined, 1269.
- text book contract, violation of, 1326, n.

## SCHOOL DISTRICT,

- sale of citizen's property, under judgment against, when enjoined, 119.
- organization of, not enjoined because of improper evidence, 1261.

THE REFERENCES ARE TO THE SECTIONS.

**SCHOOL DISTRICT** — *Continued.*

- de facto* officers of, protected, 1315.
- collection of tax to pay void judgment against, enjoined, 1557.
- joinder of tax payers, 1557.

**SCHOOL TAX,**

- when enjoined, 536.

**SECRETS,**

- disclosure of, enjoined, 19, 984, 1108.
- fraudulent, not enjoined, 19.

**SEQUESTRATION,**

- issues against municipal officers for gross contempt, 1460.

**SET-OFF,**

- proceedings at law not enjoined because of, 92.
- against judgments, 237-244.
  - not usually ground for injunction, 237.
  - damages for breach of warranty, 238.
  - wrongful attachment, 238.
  - equitable set-offs, 239.
  - effect of fraud or collusion, 240.
  - ignorance of, 241.
  - partial, 241.
  - existence of cross-demands insufficient, 242.
  - acquired after verdict, 242.
  - affected by insolvency of judgment creditor, 243.
  - judgments set off against each other, 244.
  - trustees and *cestui que trust*, 244.
  - for fraud, not allowed against purchase money, 411.
  - when no ground for enjoining sale under mortgage, 444.
- of illegal taxes, not allowed against state, 514.
- of debt, not allowed against tax, 558.
- discovery of, by administrator after judgment, 1363.

**SEWERS,**

- assessment for, when injunction allowed, 539.
- when enjoined as a nuisance, 773.

**SHAREHOLDERS** (see CORPORATIONS),

- may enjoin fraudulent usurpation of franchise, 907.
- agreement with, can not be enforced by corporation, 1179.
- injunctions in behalf of, 1203-1223.
  - acts *ultra vires* by private corporation, 1224-1229
  - plaintiff must be actual, 1228.

**SHERIFF,**

- actions against, not enjoined when statutory remedy ample, 90.
- excessive or improper levy by, no ground for relief, 121.

## THE REFERENCES ARE TO THE SECTIONS.

**SHERIFF** — *Continued.*

- duty of, when execution enjoined, 135.
- not enjoined because of proceedings on error, 150.
- sale of property by, conflicting rights, 182.
- process not enjoined when aid will be given to oppressive proceedings at law, 1325.
- return of, conclusive on motion to dissolve, 1489.
- sale by, enjoined when liability of land to, doubtful, 1543.

**SHERIFF'S DEED,**

- ejectment on, enjoined to prevent cloud upon title, 420.
- mistake in, ground for enjoining ejectment, 421.

**SICKNESS,**

- of defendant, as ground for enjoining judgment, 117, 189, 209.

**SKATING RINK,**

- enjoined as a nuisance, 772.

**SLANDER,**

- judgment in, when enjoined, 185.

**SOLICITOR** (see **ATTORNEY**),

- enjoined from acting in adverse capacity, 72.

**SOVEREIGN,**

- foreign, entitled to injunction, 27.

**SPECIAL INJUNCTION,**

- definition of, 6.
- practice on dissolution of, 1605, 1606.

**SPECIFIC PERFORMANCE,**

- injunction in aid of, 330.
- of contract to convey right of way, 634.
- contract must be susceptible of, 1109.
- injunction in aid of, 1120, 1121, 1122.
- remedy in aid of negative contracts analogous to, 1134.
- impossibility of, ground for refusing injunction, 1162.

**STATE,**

- illegal issue of stock by company incorporated in two, 1190.
- opening street over land of, without consent, enjoined, 1276.
- may modify grant to municipality, 1276.
- treasurer may be enjoined from issuing illegal bonds, 1294.
- public prosecutor of, may enjoin illegal acts of municipality, 1304.
- not enjoined from taking private property when compensation provided, 1325.
- officers not enjoined from enforcing laws, 1326.
- must show threats to act under unconstitutional law, 1327.
- can not enjoin issue of aid bonds by municipality, 1554.
  - by county court, 1556.

## THE REFERENCES ARE TO THE SECTIONS.

STATE — *Continued.*

need not bring action to restrain interference with church, 1558.  
owner of bond may enjoin diversion of funds by, 1561.

## STATUTES,

violation of, not enjoined, 20.  
regulating corporate elections no bar to relief in equity, 1232.  
subsequent, making act a misdemeanor, no bar, 1265.  
“contrary to law” includes “contrary to equity,” 1338, n.  
conferring equitable jurisdiction on law court, effect of, 1379.  
bond required by, can not be dispensed with, 1620.  
prohibiting injunctions against judgments construed, 1628.  
in absence of, equity will not assess damages on bond, 1657.  
fixing percentage of judgment as damages, does not apply to  
decree, 1666.  
applies to tax, 1679.

## STATUTE OF LIMITATIONS. (See LIMITATIONS.)

## STOCKS,

pledged as collateral, sale not enjoined because of unfavorable  
market, 454.  
illegal issue of, by company incorporated in two states, 1190.  
to officer, made by himself, 1190.  
illegal issue of preferred stock enjoined, 1226.  
subscriber to capital stock can not enjoin act *ultra vires*, 1228.  
fraudulent issue of, to control election, 1231.  
laches in correcting, a bar, 1234.  
municipal-aid subscriptions, 1282-1297.  
issue of, under public loan, not enjoined, 1326.  
disposal of, by agent, enjoined, 1559.

## STOPPAGE IN TRANSITU,

injunction not allowed in aid of, 28.

## STREETS,

irregularities in opening, no ground for injunction, 347.  
improper assessment for, relief allowed, 377, 539, 554.  
taking property for, without compensation, enjoined, 578.  
illustrations, 578.  
where deposit required, injunction allowed  
until made, 578.  
pending appeal by land-owner from  
award, 578.  
statutory or legal remedy must first be exhausted, 579, 592.  
injunction refused when relief by appeal or error, 579.  
injunction allowed when legal remedy inadequate, 580.  
action of legal tribunal not impeached collaterally, 582.  
pending appeal vacating assessment, injunction al-  
lowed, 583.

THE REFERENCES ARE TO THE SECTIONS.

**STREETS — *Continued.***

- fencing for thirty years, effect of, 584.
- how long injunction should continue, 586.
- irreparable injury must be alleged, 586.
- municipal control over, rarely enjoined, 587, 588.
  - irreparable injury must be alleged, 587.
- laying of railway tracks on, when enjoined, 589, 635, 636, 637, 826, 827.
- defendant insolvent, injunction allowed, 590.
- general injury to citizen not sufficient, 594, 827.
- vacation of, not enjoined, 594.
- where special remedy at law, injunction refused, 595.
- disfiguration of premises by, relief allowed, 597.
- land acquired for specific purpose secured by, 597.
- unauthorized opening or maintenance enjoined, 597 *a*.
- unauthorized use of, by gas company, enjoined, 597 *b*.
- right of street railway in, not exclusive, injunction refused, 609.
- when fee of, in municipality, owner can not enjoin, 637, 1274.
- erection of trestle-work in, when easily removed, not enjoined, 713.
- nuisances to streets and highways, 816-825.
  - people can, but city can not enjoin obstruction by railway, 826.
  - when one owns to line of, relief refused against street railway, 827.
  - opening street through embankment of, enjoined, 831.
- franchises in roads and railways, 912-916.
- taking sidewalk from one side of, 1247.
- illegal vacation of, 1247.
- municipal improvements, 1270-1281.

**STREET CARS,**

- running on Sunday, not enjoined, 20.

**STREET RAILWAYS,**

- actions against, for penalties, enjoined, 63.
- one must show special injury to enjoin another, 829.
- right of, in street, not exclusive, relief refused, 609, 902.
  - when disputed, relief refused, 610.
- when interlocutory injunction retained, 610.
- authority granted to, by common council, when enjoined, 613, 826.
- laying of, not a nuisance *per se*, 763, 829.
- lot owner must show special injury to enjoin, 827.

## THE REFERENCES ARE TO THE SECTIONS.

**STREET RAILWAYS** — *Continued.*

questions between rival, depending upon exclusiveness of rights, 915, 916.

coach company enjoined from using, 916.

authorized by legislature, municipality enjoined from interference, 1276.

not enjoined from using particular rail, 1281 *a*.

possible profits not allowed as damages on dissolution, 1664.

**SUITS.** (See **ACTIONS AT LAW.**)**SUNDAY,**

violation of, not enjoined, 20.

court may grant relief on, to prevent irreparable injury, 1584.

**SUNDAY SCHOOLS,**

use of church property for, when enjoined, 320.

**SUPREME COURT OF JUDICATURE ACT,**

power to enjoin under, 44.

**SUPPLEMENTAL BILL,**

not necessary where second county orders issued to avoid injunction, 1239.

relief granted on, without notice, to prevent irreparable injury, 1579.

may be filed, but should be under oath, 1585.

containing facts disconnected with original bill, can not cure defect of, 1595.

**SURETIES,**

of purchaser, injunction on failure of consideration, 67.

when judgment enjoined for protection of, 143.

in replevin, when denied relief, 256.

insolvency of, when administrator committing waste, 665.

on failure of consideration, may enjoin purchase money, 1338.

general rule in extending relief to, 1375.

aiding debtor's flight, 1375.

agreement not to sue, when for benefit of, 1375, 1376.

must be upon sufficient consideration, 1377.

when maker discharged accommodation indorser entitled to relief, 1377.

discharging principal from one of two separate things does not release, 1377.

taking additional security, 1377.

removal of property when principal insolvent, 1378.

will be in default, 1378.

statutes conferring equitable jurisdiction on common law court, 1379.

in replevin, whether debtor's property must be first exhausted, 1380.

## THE REFERENCES ARE TO THE SECTIONS.

SURETIES — *Continued.*

- laches of creditor; payment by surety, 1381.
- fraudulent representations by maker, 1381.
- agreement not to issue execution against, 1381.
- bad faith; dismissal of suit against principal, 1382.
- ignorance of defense at law without diligence no ground for relief, 1383.
- judgment on note not merged in that on injunction bond, 1384.
- suit for contribution not enjoined, 1385.
- violation of agreement to furnish co-surety, ground for relief, 1386.
- discharge of mortgage by co-surety enjoined, 1386.
- will suit on official bond be enjoined until account taken, 1386, n.

in injunction bond, 1635-1647.

## SURFACE WATER,

drawing off, 751, 809, 852, 877.

## SURPRISE,

ground for enjoining judgments, 209, 224.

## T.

## TAX DEEDS. (See TAXES.)

## TAXES,

- injunctions against, 484-577.
  - principles governing the jurisdiction, 484-523.
    - authorities conflicting, 484.
    - equity averse to interference, 485.
    - illegality or irregularity insufficient ground for, 485.
      - exception where proceedings under legal color, 485.
      - entire absence of authority, 485.
    - federal courts interfere cautiously, 485.
    - assessment, irregularities or errors in, no ground for enjoining, 486.
      - parties left to legal remedy, 486.
    - equity powerless to correct tax, 487.
    - assessment improperly made does not authorize injunction, 488.
      - irregularities of officers in, no ground for relief, 488.
      - defects in assessment roll, 488.
      - irregularities in publishing notice, 488.
      - remedy at law a bar, 488.



## THE REFERENCES ARE TO THE SECTIONS.

TAXES — *Continued.*

- distinction between mode of collection and rate of assessment, 488.
- injunction denied because of irregularity in books and returns, 489.
  - in not seizing personal property, 489.
  - in misnomer of corporation, 489.
  - in failing to list property, 489.
- transfer of certificates not enjoined for irregularities, 489.
- nor issuing of tax deed, 489.
- excessive levy no ground for relief, 489.
- officers, conduct of, presumed regular, 490.
  - fraud of, general allegations insufficient, 490.
  - want of authority of, distinguished from wrongful execution, 490.
- defect in law and irregularities in execution distinguished, 490.
- distinction between void and voidable tax, 490.
- judgment of officers not interfered with, 490.
- remedy at law a bar to relief, 491.
- irreparable injury must be shown, 491.
  - how averred, 491.
- insolvency of assessor no ground for relief, 491.
- injunction not allowed because of irregularities in time, 492.
  - in sale of taxes, 492.
  - not allowed because of probable litigation, 492.
    - nor in advance of steps for collection, 492.
- boards of equalization, action of, not revised in equity, 493.
  - remedy before, must be followed, 493.
  - errors or irregularities of, no ground for relief, 493.
  - arbitrary and fraudulent action of, ground for relief, 494.
  - want of notice ground for, 494.
- notice of increase, want of, authorities unsettled, 495.
- unconstitutionality of tax, authorities conflicting as to enjoining, 496.
  - inadequacy of legal remedy a test, 496.
- amount due, payment or tender necessary, 497.
  - bill should show, 497.
  - what a sufficient averment, 497.
  - actual payment, whether necessary, 497.
- entire tax not enjoined when part legal, 498.
  - illustrations of the doctrine, 498.

## THE REFERENCES ARE TO THE SECTIONS.

TAXES — *Continued.*

- the question as affected by statute, 499.
- fraud as ground for enjoining, 500.
  - arbitrary increase, 500.
  - taxes for payment of fraudulent judgments, 500.
  - fraudulent assessment, 500.
- fraudulent combination at tax sale, 500.
- omission of officer to qualify, authorities conflicting, 501.
- absence of power and irregular exercise distinguished, 502.
- Illinois doctrine, 503.
- Wisconsin doctrine, 504.
- tax on personal property, injunction refused, 505.
  - rolling stock of railway, 505.
  - mill property, 505.
  - injunction allowed when tax paid, 505.
- corporations, capital stock and franchise of, when tax enjoined, 506, 906.
- on national bank shares, when enjoined, 507.
- United States revenue tax, when enjoined, 508.
- levy for tax due from third person, not enjoined, 509.
  - enjoined when collector insolvent, 509.
- defect cured by legislation, 510.
  - effect of injunction in such case, 510.
- proceedings preliminary to levy not enjoined, 511.
- extension on collector's books not enjoined, 511.
- application for judgment not enjoined, 512.
- payment of, ground for injunction, 512.
- illegal tax paid, can not be set off, 512.
- tax against corporation fixed by arbitrator, when enjoined, 513.
- set-off of illegal taxes, not allowed against state, 514.
- refusal of injunction confers no power, 515.
- perpetual injunction, when void as to subsequent tax, 515.
- turnpike company not properly incorporated, taxes for, enjoined, 516.
- improper contracts for improvements, taxes enjoined, 516.
- sale of lands for, enjoined when personalty subject to, 517.
- good cause of action in part, demurrer not sustained, 518.
- entire tax not enjoined because too much assessed, 518.
- injunction refused pending *mandamus* to compel appeal, 519.
- injunction not reversed because bond insufficient, 519.
- tax upon franchise not enjoined, 520.
- assessment for paving, when not enjoined, 520.
- depreciation in property no ground for relief, 521.
- when jurisdiction attaches, sale of personalty enjoined, 522.

## THE REFERENCES ARE TO THE SECTIONS.

TAXES—*Continued.*

homestead law, property held under, when tax not enjoined, 523.

upon railway property, when enjoined, 523 *a*.

cloud upon title, injunctions for prevention of, 524-529.

relief granted for prevention of, 524.

illustrations of the rule, 524.

illegality constituting, must be *dehors* the record, 525.

different lots assessed together, 525.

vagueness of description, 525.

when proceedings apparently regular injunction allowed, 526.

fraudulent action of board of equalization, injunction allowed, 527.

injunction allowed for fraud, 528.

excessive valuation, 528.

sale by sheriff, when enjoined, 529.

sale of realty enjoined until personalty sold, 529.

property exempt from taxation, 530-535.

ground for injunction, 530.

in case of corporate property, 530.

railway property, 531.

Indian lands, 532.

title still in United States, 532.

remission of tax, ground for relief, 533.

transfer of taxing power under unconstitutional law enjoined, 534.

parties to such proceeding, 534.

omission to tax railways, effect of, 534.

entire tax not enjoined for partial exemption, 535.

tax on property in receiver's hands, not enjoined, 535.

municipal taxes, injunctions concerning, 536-560.

injunctions more freely granted against, 536.

illustrations of, 536.

beyond constitutional limit, enjoined, 536.

want of uniformity in, ground for relief, 537.

discrimination against traders, 537.

invalidity of, *dehors* the record, enjoined, 538.

improper assessment, 538.

exemption, 538.

assessment for streets and sewers, when injunction allowed, 539.

property taxed in different counties or towns, injunction allowed, 540.

THE REFERENCES ARE TO THE SECTIONS.

**TAXES — Continued.**

- for payment of debt improperly incurred, relief allowed, 541.
- to abate nuisance created by city, enjoined, 542.
- for unauthorized purposes, enjoined, 542.
- legal remedy for, injunction refused, 543.
- municipal officers, action not revised in equity, 544.
  - title of, not inquired into, 544.
  - irregularities of, no ground for relief, 544.
- illegality of, relief refused, 545.
- sale of personalty under, not enjoined, 546.
- extending limits of municipality, when ground for injunction, 547.
  - motives of extension not inquired into, 547.
  - annexation of part treated as void, 547.
  - proceedings wholly void, injunction allowed, 547.
- right of way taxed as lots, injunction allowed, 548.
- vacation of plat, relief allowed, 548.
- property placed outside limits, tax enjoined, 548.
- estoppel, when bar to relief, 549.
  - the doctrine illustrated, 549.
  - exception to rule when tax void, 550.
  - payment under protest not an, 550.
- amount due must be first paid, 551.
- enjoined in action to set aside fraudulent contract, 552.
- upon occupation, when enjoined, 553.
- finer for non-payment of, not enjoined, 553.
- levied as an entirety, when enjoined, 554.
- not enjoined when ordinance repealed, 555.
  - plaintiffs not subject to ordinance, 555.
- election for, not enjoined, 555.
- for street improvements, enjoined for want of consent, 556.
  - not enjoined for interference with plank road company, 556.
- drainage company improperly organized, relief allowed, 556.
- omission of lands from list, injunction allowed, 556.
- for illegal municipal bonds, when refused, 557.
- debt due tax payer not set off against, 558.
- not invalid because bonds enjoined, 559.
- effect of charter requiring contracts to be let to lowest bidder, 560.

## THE REFERENCES ARE TO THE SECTIONS.

**TAXES** — *Continued.*

municipal-aid taxes, 561-569.

illegal, tax payer may enjoin, 561.

illustrations of rule, 561.

in levy of, non-compliance with legal conditions, injunction allowed, 562.

want of notice of election for, in aid of plank road company, relief allowed, 562.

appropriation of, to two roads in entirety, instead of separately, injunction allowed, 562.

fraud by railway in securing tax, enjoined, 563.

money expended by, when fraud not known, no estoppel, 563.

mistake of clerk in certifying election, injunction allowed, 563.

tax payer remaining silent, estopped to enjoin, 564.

election properly held, relief refused, 565.

effect of statute requiring petition for submission to vote, 565.

regular consolidation of railroad with another, tax not enjoined, 566.

not enjoined because bonds issued by *de facto* officers, 567.

where defense to bonds not shown, 568.

distinction as to whether bonds are or are not issued, 568.

not enjoined when bonds legal and held by *bona fide* holders, 569.

bounties to soldiers, 570-572.

unauthorized tax for, enjoined, 570.

authorized tax for, not enjoined, 570.

effect of subsequent legalization, 570.

compliance with statute required, 571.

quota filled, tax enjoined, 571.

tax for, on exempted property, enjoined, 571.

illegal tax for, when not enjoined, 572.

when legalized, injunction dissolved, 572.

bounty for destruction of wolves, when not enjoined, 572.

parties to proceedings, 573-577.

unless proper, relief refused, 573.

one not liable to tax, not proper party to bill, 573.

citizens of, not township, should sue, 573.

tax payer directly affected, alone entitled to file bill, 573.

illustrations of rule, 573.

THE REFERENCES ARE TO THE SECTIONS.

# **TAXES—Continued.**

- individual tax payers may join in bill, 574.
- several may sue for themselves and others, 574.
  - exception to the rule, 575.
- whoever necessary to proper solution, should be made defendant, 576.
  - illustrations of rule, 576.
- railway passing through counties, when proper to make counties defendants, 577.
- school district necessary party on bill to enjoin school bond, 577.
- drainage company improperly organized, 577.
- against franchise, when enjoined, 906.
  - when not, 906.
- tax payer affected by illegal contract may enjoin, 1199.
- levied upon territory illegally annexed to municipality enjoined, 1254.
- municipal-aid subscriptions, 1282-1297.
- tax payer may enjoin illegal act of municipality, 1298.
- collection of, to pay void judgment, joinder, 1557.
- tax payers may enjoin unlawful act of county, 1560.
  - how action should be brought, 1560.
- damages when tax enjoined, 1679.
  - counsel fees when collection of tax by city enjoined, 1691.

# **TELEGRAPH,**

- injunction refused against, 825 *a*.
- enjoined from discrimination in market reports, 1202 *a*.
- on line of railroad, injunctions between, 1202 *a*.
- wires cut by city, relief refused, 1281 *a*.
- notice of injunction by, sufficient, 1424.

# **TELEPHONE,**

- injunction against, 825 *a*.

# **TENANT (see LANDLORD AND TENANT),**

- claiming under devisees, rights of, 339.
- when may enjoin writ of possession, 427.
- of receiver, enjoined on motion, 1566.
- damages when dispossession for non-payment of rent enjoined, 1683.

# **TENANTS IN COMMON,**

- of personalty, injunctions between, 14.
- of realty, injunctions between, 344.
- when sale of mortgaged premises enjoined, 475.
- purely equitable waste not enjoined between, 685.
- equity will not ordinarily restrain waste by, 692.

## THE REFERENCES ARE TO THE SECTIONS.

**TENANTS IN COMMON** — *Continued.*

- of water, when relief allowed between, 806.
- of trade mark, either may enjoin infringement, 1102.
- cemetery, rights of, 1199, n.

**TENANT FOR LIFE,**

- and remainder-man, rights of, 331,
- in cases of waste, 686, 687.

**TENDER,**

- to purchaser under illegal sale, 365.
- when necessary to enjoin foreclosure because of usury, 447.
- of tax due, when necessary before enjoining, 497, 498.
- of damages in opening highways, bars relief, 585.
- of stock assessment when made, relief granted against sale, 1219.
- closing up street enjoined upon tender of damages, 1277.
- of conveyance necessary before injunction against purchase money judgment dissolved, 1544.

**THREATS,**

- sufficient ground for relief, 18.
- to take possession of right of way, must be averred, 628.
- of waste, sufficient ground for relief, 655.
- of abuse of municipal powers, 1255.

**TIMBER,**

- on mortgaged premises, cutting enjoined, 480.
- removal of, when not enjoined, 480.
- destruction of, when enjoined, 671-679, 723-729.

**TITLE** (see CLOUD UPON TITLE; JUDGMENTS; REAL PROPERTY; SALES),  
judgments as affecting, 245-264.

- sale not enjoined because of irregularities, 245.
- prevention of cloud, when sale enjoined, 248.
- not enjoined, 249.

failure of, when judgment for purchase money enjoined, 250, 251.

- equity averse to interfering with questions of, 324.
- proceedings affecting, not enjoined when remedy at law, 325.
- want of, as ground for enjoining judicial sales, 367-371.
- cloud upon, injunctions to prevent, 372-381.
- collection of purchase money on failure of, 382-413.
- failure of, no ground for enjoining sale under trust deed, 474.
- naked question of, between railroad and land owner, relief refused, 629.
- injunction pending trial of, at law, 650.
- complainant's, must be clear in cases of waste, 651.
- must be established at law in cases of waste, 652.

THE REFERENCES ARE TO THE SECTIONS.

**TITLE** — *Continued.*

- claim of entire, must accompany adverse possession, to enjoin waste, 654.
- defendant must have, in actions of waste, 656.
- pending action to try, when cutting timber enjoined, 671, 674, 675, 676.
- when denied or in doubt, trespass rarely enjoined, 698, 701, 728.
- in trespass must be established, 701, 705, 726.
- when answer shows none and denies equity of bill, injunction against trespass dissolved, 716.
- usually required in trespass to mines, 731.
- to mines, court of equity will not try, 732.
- prima facie*, with possession, sufficient, 732.
- of play, not protected, 1045.
- of magazine or paper, when protected as a trade mark, 1078, 1079, 1099.
- use of premises by lessee adverse to covenants gives no, 1143.
- to offices in corporation, equity will not determine, 1235, 1312.
  - to municipal offices, 1256.
  - to public office, 1312.
  - illustrations, 1313.
- payment of salary of incumbent not enjoined, 1314.
- possession of *de facto* officer protected, title not determined, 1315.
- of wife, where doubtful, relief refused, 1388, 1390.
- answer must deny plaintiff's, on motion to dissolve, 1513.
- diligence required in prosecuting action involving, 1542.
- dissolution of injunction against judgment for purchase money, 1544, 1545.
- general denial of fraud in defendants, insufficient, 1546.
- use of burial ground protected against holder of legal, 1558.
- affidavits can not contradict answer on question of, 1576, 1603.
- damages when defect in cured after injunction, 1678.
- counsel fees when adjudication of, main relief sought, 1686.

**TRADE,**

- contracts in restraint of, 1167-1183.

**TRADE MARKS,**

- nature of the right and its infringement, 1063-1084.
- definition of trade mark, 1063.
  - articles need not have general notoriety, 1063.
  - where devices refer to nature or quality of article, 1063.
  - "nourishing," 1063.
  - "washing powder," 1063.



THE REFERENCES ARE TO THE SECTIONS.

TRADE MARKS — *Continued.*

- no property in name of place of manufacture, 1064.
- when new attribute imposed upon word, 1064.
- use of word indicating proprietorship, 1064.
- when article has become well known, 1064.
- acquiescence in use of name of place a bar, 1065.
- proceeding in England against principal a bar to proceedings against agent, 1065.
- use of same labels and wrappers with intent to deceive public, enjoined, 1065.
- where place given new name, old name protected, 1066.
- street name and number, 1066.
- calling defendant's house by name of plaintiff's residence, not enjoined, 1066.
- unmeaning name or symbol, 1067.
  - use of, with different class of goods, 1067.
- colorable imitation enjoined, 1067.
  - difference only in use of name, 1067.
- manufacturers protected in trade mark, 1068.
  - system of numbers, 1068.
    - designations of size, shape or quality not protected, 1068.
- fraud the basis of jurisdiction, 1068.
- what necessary to constitute piracy, 1068.
- acquiescence a bar, 1068.
- fraud and deception of public, 1069.
  - use of one's own name enjoined, 1069.
    - family name enjoined, 1069.
  - mere colorable change in name after injunction a contempt, 1069.
- in absence of fraud, injunction refused against use of one's name, 1069, 1070.
  - corporation may use name, 1070.
- combination of letters a trade mark, 1071.
- fanciful name, 1071.
  - "Eureka," "Parabola," 1071.
- use of firm name in connection with, no bar, 1071.
- foreign words may be a, 1072.
- "original," 1072.
- assignee of inventor protected, 1072.
- advertising as only genuine article, enjoined, 1072.
- patentee under expired patent can not convert description into a trade mark, 1073.

## THE REFERENCES ARE TO THE SECTIONS.

TRADE MARKS — *Continued.*

- words "cough remedy" not a trade mark, 1074.
  - when defendant's remedy will not deceive, injunction refused, 1074.
- use of plaintiff's name in connection with article may become a trade mark, 1075.
- form or color of article, 1076.
- size or shape of package, 1076.
  - barrel, 1076.
  - tin pail, 1076.
- where form, color, wrappers and labels will deceive, injunction allowed, 1076, 1077.
- adoption of brand enjoined, 1077.
- names and devices of rival omnibuses enjoined, 1077.
- name of hotel a trade mark, 1077.
- where foreign word merely a warranty, relief refused, 1077.
- title of literary work, magazine or paper protected, 1078, 1079.
  - case must be clear, 1079.
    - doubt as to identity of two newspapers, 1079.
  - publication must have an actual existence, 1079.
  - similar publication of two songs, 1079.
- partnership rights in firm name and trade mark, 1080.
- corporate name protected, 1081.
  - right to use of, need not be established at law, 1081.
  - jurisdiction does not rest upon insolvency, 1081.
  - corporation a necessary party, 1081.
- commodity protected whether work of nature or man, 1082.
  - mineral water, 1082.
  - assignee of spring protected, 1082.
  - name applied to water protected, 1082.
- relief granted against former employe, 1083.
  - court may require proof of notice to stop, 1083.
  - copying medical receipts, 1083.
- accounting, 1084.
- principles governing the relief, 1085-1101.
  - general doctrine stated, 1085.
    - trade mark and unlicensed imitation must be established, 1085.
    - use of name in particular place enjoined, 1085.

THE REFERENCES ARE TO THE SECTIONS.

TRADE MARKS — *Continued.*

- defrauding public by short weight, effect of, as a bar to relief, 1085, n.
- deception must be shown, 1086.
  - burden of proof on plaintiff, 1086.
  - relief refused when difference in names or articles clear, 1086, 1088.
  - fraudulent intent not necessary, 1087.
  - tendency to mislead public sufficient, 1087, 1088.
  - when purchaser not actually deceived, 1087.
- piracy of part of trade mark enjoined, 1087.
- sufficient if ordinary purchasers, using ordinary care, are deceived, 1088, 1089, 1090.
  - "Punch," "Punch and Judy," 1088, n.
  - where difference plain, relief refused, 1089.
- colorable imitation sufficient, 1090.
  - when name *idem sonans*, and boxes and wrappers similar, 1090.
- when name *publici juris*, 1090.
- distinction between representations that goods are identical, and of quality, 1091.
- unauthorized publication of one's name in prospectus, enjoined, 1091.
- plaintiff's deceit and misrepresentation, 1092.
  - falsely representing goods as patented, 1092.
  - use of word "patent," 1092.
  - where mark itself is *bona fide*, but fraud in collateral matter, 1092.
  - misrepresentations since commencement of suit, 1092.
- infringement of some property right must be shown, 1093.
  - mere slander or libel not enjoined, 1093.
  - false advertisement of premium, 1093.
  - advertisement of apology not enjoined, 1093.
- plaintiff's fraud, 1094.
  - selling gin under name of schnapps, 1094.
- labels or brands, 1095.
  - when defendant's name indicated, 1095.
  - where plaintiff's right doubtful, relief refused, 1095.
- sale of genuine and original articles not enjoined, 1096.
- relief refused in cases of doubt, 1097.

## THE REFERENCES ARE TO THE SECTIONS.

TRADE MARKS—*Continued.*

- when defense of common use interposed, what must be shown, 1097.
- promise to refrain, no bar to relief, 1098.
- name of periodical or newspaper protected, 1099.
  - illustrations, 1099.
  - public must be deceived, 1099.
- diligence necessary, 1100.
  - delay of nine months, 1100.
  - six months, 1100.
  - protest against use, 1100.
- acquiescence, 1101.
  - new right must be created in defendant, 1101.
- parties, 1102–1105.
  - owner and agent can not join, 1102.
  - locus* of offense immaterial, 1102.
  - alien entitled to relief, 1102.
  - where property of tenants in common, 1102.
  - every one engaging in sale enjoined, 1102, 1105.
  - assignee, 1103.
    - where firm has changed, 1103.
  - different persons entitled to same name, 1104.
- what sufficient description to punish for contempt, 1459.

## TRADERS,

- tax against, enjoined when not uniform, 537.

## TRESPASS,

- distinction between waste and trespass, 650.
- injunction pending trial of title in action of, 650.
- origin and nature of the jurisdiction, 697–722.
  - general rule as to granting relief, 697.
  - injury must be irreparable, 697.
- relief generally refused when title denied, 698.
  - strong case of irreparable mischief, relief granted, 698.
- remedy at law a bar to injunction, 699.
- illustrations of rule, 699.
- sale of *feme covert's* property under execution against husband enjoined, 700.
- prevention of multiplicity of suits ground for relief, 700, 702.
- where different persons assail the same right relief granted, 700.
- conditions upon which relief is granted, 701.
  - complainant's title must be established, 701.
  - injury must be irreparable, 701.

THE REFERENCES ARE TO THE SECTIONS.

**TRESPASS — *Continued.***

- injury irreparable, when continuing trespass will ripen into easement, 702.
- when municipal officers threaten destruction of ornamental trees and shrubbery, 702.
- when wrongful acts may occasion multiplicity of suits, 702.
- interference with burial grounds restrained, 703.
- encroachments upon land of adjoining proprietor enjoined, 704.
  - excavation of soil of complainant enjoined, 704.
  - removal of bricks from wall enjoined, 704.
    - stones from sea-wall enjoined, 704.
  - unauthorized tearing down by building inspector enjoined, 704.
  - further illustrations, 704.
- damage should be made to appear, 705.
- failure to show title bars relief, 705.
- erection of wooden fence no ground for relief, 706.
- percolation of water caused by non-repair of ditch not enjoined, 706.
- throwing mud and earth not restrained, 706.
- relief freely exercised where buildings uncompleted, 707.
  - fraudulent and oppressive conduct, 707.
- injunction made mandatory when trespass irreparable and continuing, 708.
  - health officers compelled to close sewer, 708.
  - manager compelled to admit owner to premises, 708.
  - against building on roof of house, 708.
  - not when title controverted and defendant in possession, 708.
- pulling down buildings and removal of materials enjoined, 709.
- quarrying stone in excess of right enjoined, 709.
- erection of piers by foreign corporation enjoined by people, 710.
- when common interest extinguished, trespass upon others enjoined, 711.
- relief refused when trespass simply forcible entry and detainer, 712.
- when trestle-work easily removed, injunction refused, 713.

## THE REFERENCES ARE TO THE SECTIONS.

TRESPASS — *Continued.*

- when taking of stone from ledge can be compensated, relief refused, 713.
- church trustees may enjoin interference with church, 714.
  - when legal right and violation established, injunction perpetuated, 714.
- court will not reinstate complainant in possession, 715.
- ripening into nuisance enjoined, 715.
- removal of asphaltum enjoined, 716.
- landing of passengers at dock not enjoined, 716.
- when answer shows no title and denies equity of bill, injunction dissolved, 716.
- insolvency of defendant ground for relief, 717.
- continuing act may be enjoined, 717.
- when complainant not in possession and maintaining remedy at law, relief refused, 718.
- removal of articles of necessity enjoined, 719.
  - luxury not enjoined, 719.
- discretion of inferior court not interfered with when defendant solvent, 720.
- when interlocutory injunction retained, 721.
  - when exclusive right to take oysters claimed, 721.
  - other illustrations, 721.
- facts showing irreparable mischief must be set forth, 722.
- allegation that trespass is continuing, necessary, 722.
  - of ownership in fee and possession sufficient, 722.
- upon public lands enjoined, 722 *a.*
- cutting of timber, when enjoined, 723-729.
  - strong case of destruction or irreparable mischief necessary, 723.
  - dispute as to title between devisee and heir-at-law a bar, 723.
  - relief barred where ownership of pine lands in doubt, 723.
  - where allegations in bill vague and on information, relief refused, 723.
  - other illustrations, 723.
- when owner deprived of accustomed use of property, relief granted, 724.
- cutting of wood on premises enjoined, 724.
  - relief not refused when facts showing irreparable injury alleged, 724.

THE REFERENCES ARE TO THE SECTIONS.

TRESPASS—*Continued.*

- destruction of forest trees enjoined, 724.
- cutting of walnut trees on timber lot enjoined, 724.
- complainant in possession with remedy at law, relief refused, 724.
- patentee may restrain future cutting, but not removal of timber already cut, 725.
- right must be clear and mischief irreparable, 726.
- long possession protected, 726.
- destruction of fruit trees and ornamental shrubbery, 727.
- absolute insolvency not necessary, 727.
- enjoyment from, not value of property, test, 727.
- where title doubtful, relief refused, 728.
- illustrations, 728.
- when judgment debtor fraudulently conveys timber, cutting enjoined, 729.
- relief in cases of trespass to mines, 730-738.
  - greater latitude than in ordinary cases, 730.
  - when legal title clear, removal enjoined though action at law would lie, 730.
  - removal of stone from quarry enjoined, 730.
  - plea to jurisdiction, when injunction granted, 730.
  - complainant usually required to show good title, 731.
  - rule relaxed when substance of estate affected, 731.
  - removal of ore already extracted enjoined, 731.
  - acquiescence a bar to relief, 731.
  - court of equity will not try title to mines, 732.
  - prima facie* title with possession sufficient, 732.
  - injunction granted pending trial of title at law, 732.
  - flowing of refuse matter over claims enjoined, 733.
  - when injunction made perpetual, 733.
  - working through into another's mine enjoined, 734.
  - digging ore on public land enjoined, 734.
  - placer mines, principles peculiarly applicable, 735.
  - surface owner entitled to relief against owner of minerals, 736.
  - where right reserved relief refused, 736.
  - lessee enjoined from reducing pillars, 737.

## THE REFERENCES ARE TO THE SECTIONS.

TRESPASS — *Continued.*

when lessee has worked into adjoining premises, inspection compelled by mandatory injunction, 737.

diversion of water from tunnel, when enjoined, 738.

distinction between trespass and nuisance, 739.

to franchise enjoined when legal remedy inadequate, 912.

continuing by corporation, ground for relief, 1187.

## TRUST DEED. (See DEED OF TRUST; MORTGAGES.)

## TRUSTEES (see TRUST),

restrained from exceeding authority, 24.

unfavorable sale, 24.

breach of trust, 24.

caution in restraining, 25.

general charges against, insufficient, 25.

when relief denied, 25.

sale of property held by, requisites of bill to enjoin, 119.

enjoined from collecting judgment because of set-off, 244.

of religious body, misconduct ground for relief, 314.

not enjoined from sale of church property, 315.

intrusion by, upon functions of minister, 315.

proper parties to enjoin interference with church property, 316, 1558.

enjoined from leasing property for school purposes, 320.

not enjoined from rebuilding, 321.

sale of realty held by, when enjoined, 330.

insolvency of, no ground for enjoining sale under deed of trust, 451.

want of notice by, sale enjoined, 451.

of church, may enjoin interference with property, 714.

purchase by president of corporate indebtedness, 1201.

when equities of bill not denied by writ, injunction continued, 1535.

execution of injunction bond by, 1634.

can not release damages incurred by injunction against sale, 1671.

## TRUSTS (see ECCLESIASTICAL MATTERS; TRUSTEES),

injunctions in cases of, 24.

execution enjoined because of, 82.

in real property, injunctions concerning, 330.

property held in, sale under execution enjoined, 371.

corporate property affected by, 1184.

of municipal corporation, 1236.

general charges of abuse of, insufficient to sustain writ, 1483.

when answer of one defendant does not sufficiently deny fraudulent relinquishment of, 1532.



THE REFERENCES ARE TO THE SECTIONS.

**TRUSTS** — *Continued.*

where complainant's right rests in, injunction against action at law retained, 1537.

**TURNPIKE COMPANY,**

taxes for, when enjoined, 516.

**U.****ULTRA VIRES,**

acts of private corporations, 1224-1229.

municipal corporations, 1237, 1241, 1247.

improvements, 1271.

**UNITED STATES,**

district judge of, power to grant injunctions, 43.

injunctions as between courts of, and state courts, 108-111, 266-268.

not enjoined from enforcing judgment paid, 137.

not allowed to enjoin sale of vessels, 137.

courts of, jurisdiction in aid of bankruptcy, 282-303.

land office, records of, as affecting cloud upon title, 376.

courts of, interfere cautiously with collection of state revenue, 485.

may enjoin digging of ore on public lands, 734.

injury to public improvements, 803.

department officers may be enjoined, 803, n., 1324.

Supreme Court will enjoin bridge across navigable river, 833.

franchise created by, protected, 906.

courts of, alone give relief in patent cases, 934.

copyright cases, 989.

may enjoin officers of canal from interfering with improvements, 1221.

alien may enjoin aid bonds in courts of, 1287.

officers of, not enjoined by state courts, 1322.

revenue officers not enjoined on mere apprehensions of injury, 1322.

president of, not enjoined, 1323.

parties to bill for injunction against judgment in courts of, 1552.

notice of application for writ in courts of, 1578.

doctrine of courts of, regarding taking of injunction bond, 1656.

effect of writ of error from United States Supreme Court, 1699.

**USURY,**

when action enjoined because of, 76.

judgments affected by, 232-234.

not usually enjoined, 232.

## THE REFERENCES ARE TO THE SECTIONS.

USURY — *Continued.*

- when enjoined, 233.
- not enjoined in behalf of other creditors, 234.
- recoupment for, not allowed against purchase money, 411.
- as ground for enjoining foreclosure, 447.
- when tender necessary, 447.
- usurious contracts, when enjoined, 1116.
- after judgment recovered, 1117.
- where transaction very complicated, 1117.

## V.

## VENDEE. (See VENDOR; VENDOR'S LIEN.)

## VENDOR (see REAL PROPERTY; SALE),

- when denied injunction against sale of realty, 334.
- not enjoined from re-entry, 342.
- enjoined from removing fruit trees and shrubbery, 343.
- sale under judgment against, when vendee may enjoy, 379.
- injunctions against collection of purchase money on failure of title, 382-413.
- of infringement enjoined, 1062.
- bound by covenants in sale of realty, 1158.

## VENDOR'S LIEN,

- removal of emblements pending suit for, 331.
- on right of way, receiver appointed to protect, 627.

## VENUE,

- change of, when allowed, 79.

## VERIFICATION,

- of bill of injunction, 36. 1567.
- of petition in bankruptcy, false, effect of, 301.
- of bill, improper, ground for dissolution, 1484.
- by one complainant sufficient, 1493.
- failure to verify, ground for dissolution, 1496.
- by solicitor without knowledge, 1514.
- of creditor's bill, by attorney, 1567.
- by agent; by next friend of married woman, 1567.
- by corporation, 1568.
- nature and requisites of affidavit, 1569.
- of information by attorney-general, 1570.
- when dispensed with, 1572.
- defective, not supplied on motion to dissolve, 1614.
- neglect of officer to sign jurat, 1614.

## VESSELS,

- sale of, when not enjoined, 137.
- enjoined in bankruptcy, 295.

## THE REFERENCES ARE TO THE SECTIONS.

VESSELS — *Continued.*

ordinance for landing of, at public wharf, not enjoined, 1245.

part owner can not enjoin sailing of, 1347.

creditor with lien on freight for supplies, may enjoin transfer of, 1404.

## VIOLATION,

effect of the writ and its violation, 1416-1431.

must be observed however erroneous, 1416

want of equity in the bill, 1416.

reason of the rule, 1417.

if court had jurisdiction, injunction only voidable, 1417.

too broad in its terms, 1417, 1418.

a contempt regardless of motive or capacity of actor, 1418, 1420.

court will consider irregularity of injunction, 1418, 1462.

disclaimer of intention to violate, 1418, 1456.

guilt must be clearly established, 1419.

spirit, not the letter, considered, 1419, 1446.

advice of counsel no defense, 1420.

on legality of service, 1420.

when accepted in good faith, considered, 1420.

writ operative from granting of order, 1421.

defendant's liability fixed when notice shown, 1421.

cutting timber after verbal, 1421.

commission of waste after, 1421.

defendant need not be officially apprised of writ, 1422.

actual notice sufficient, 1422.

great negligence in serving, 1423.

leaving court before order made, 1423.

notice from one of the parties, 1423.

by telegraph sufficient, 1424.

sale by sheriff after, 1424.

reading to president in presence of other officers of corporation, 1424.

service on clerk of defendant insufficient, 1424.

court must have jurisdiction, 1425.

injunction against holding election; against canvassing returns; fine, 1425.

officer must obey the law and disregard the writ, 1425, n.

THE REFERENCES ARE TO THE SECTIONS.

**VIOLATION —** *Continued.*

- attorneys, duties of, 1426.
  - advising bank to file petition in bankruptcy; punishment, 1426.
  - acting for two clients when one only is enjoined, 1426.
- defendant can not experiment with the writ, 1427.
- common rumor of dissolution no excuse, 1427.
- running ferry-boat by president of ferry company, 1427.
- contract for jail, conditioned upon dissolution, not a contempt, 1427.
- injunction against railway operative against receivers appointed by federal courts, 1428.
  - violation before removal; inaction of one, 1428.
- compliance with order by plaintiff necessary, 1429.
  - failure to give bond or file bill, 1429.
- on *habeas corpus*, question of jurisdiction only, considered, 1430.
- appeal does not revive injunction, 1431.
- where relief granted on final hearing, but stay of proceedings ordered, 1431, n.
- what constitutes a violation, 1432-1448.
  - offense must be injurious to plaintiff's rights, 1432.
    - defendant in creditor's bill taking judgment against third person, 1432.
    - bringing action for a tort, 1432.
    - giving draft in pursuance of previous agreement, 1432.
  - regard must be had to terms of writ, 1433.
    - prohibiting certain injurious results, 1433.
  - of injunction against proceedings at law, 1434.
  - agent with knowledge liable, 1435.
  - liability of stranger, 1435.
    - aiding another a violation, 1435.
  - assignee of chose in action when writ still in force against assignor, 1436.
  - injunction against sale by trustees, suit by, to recover property, 1436.
  - action by all after dissolution as to part, 1436.
  - breach need not be committed in person, 1437.
    - attaching creditor permitting officer to sell, 1437.
    - one who stands by and permits violation, guilty, 1437, 1438.

## THE REFERENCES ARE TO THE SECTIONS.

VIOLATION — *Continued.*

- consent to violation an estoppel, 1437.
- mere passive obedience insufficient, 1438.
- disobedience under other authority not allowed, 1439.
- person not named not liable, 1440.
- violation by servants of defendant who is innocent, 1440.
- where attorney enjoined defendant can not proceed at law, 1440.
- tenants are not "agents or servants," 1440.
- by attorney, when served pending application for receiver, 1441.
- bringing action in United States court after injunction in state court, 1441.
- injunction against "any one acting in behalf of railway," president liable, 1442.
- passage of resolution by common council, even when unaccepted, a contempt, 1443.
- use of machinery in steamboat, chief engineer liable, 1443.
- defective service no excuse, 1444.
- officer proceeding with sale, trespasser *ab initio*, 1444.
- must interfere with free exercise of right of way, 1445.
  - where a right of way and right of soil exists, 1445.
- spirit of injunction to be regarded, 1419, 1446.
- fifteen actions of trespass for passage of barge along canal, 1446.
- injunction not retroactive, 1447.
  - where iron of track purchased before writ issued, 1447.
  - inability to comply with mandatory injunction granted to enjoin delivery of bonds, 1447.
  - delivery in pursuance of sale made before injunction, 1447.
  - doing acts after writ where part of injury already done, 1447.
- granting writ after peremptory writ of *mandamus*, 1447, n.
- procuring another to purchase patented article allowable, 1448.
- remedy for violation, 1449-1466.
  - attachment for contempt, usual remedy, 1449.
  - merits of cause not inquired into, 1449.

THE REFERENCES ARE TO THE SECTIONS.

**VIOLATION —** *Continued.*

*quasi* criminal; may be brought in behalf of people;  
counsel for government, 1449.

person applying must have interest, 1449.

plaintiff's conduct; defendant's motive, 1450.

pleading to action at law; misrepresentations to public  
of nature of the writ, 1450.

acquiescence must create new right in defendant, 1450.

laches in obtaining service, 1451.

violation usually proved by affidavit, 1452.

rule to show cause merely a process, 1452.

foundation for, need not appear in, 1452.

service of writ must appear, 1452.

dismissal for want of affidavit of, no bar to  
subsequent proceedings, 1452.

one of several defendants may be proceeded against,  
1452.

examination of, without a jury under Kansas practice,  
1452, n.

removal of cause to United States courts, 1453.

procedure in United States courts, 1454.

what plaintiff must show, 1454.

specific act of contempt must be stated, 1455.

proofs admissible to deny defendant's answer to inter-  
rogatories, 1455.

defendant may show expiration of writ, 1455.

voluntary submission considered in mitigation, 1456.

disclaimer of intention to violate, 1418,  
1456.

considerations arising from ignorance and advice of  
counsel, 1457.

punishment of wilful violation, 1457.

error to divide fine between state and injured party,  
1457.

appellate court averse to interfering with punishment,  
1458.

evidence of damage admissible, 1459.

other acts of contempt inadmissible, 1459.

untruth of allegations of bill inadmissi-  
ble, 1459.

writ should be plain and specific, 1459.

description of trade mark in, 1459.

corporation punishable, 1460.

sequestration will issue against board of mu-  
nicipal officers, 1460.

THE REFERENCES ARE TO THE SECTIONS.

VIOLATION — *Continued.*

- attachment not the only punishment, 1461.
  - compelling restoration of land taken in violation of writ, 1461.
  - when sale of property made in violation of writ, 1461.
  - when delivery of property not required, 1461.
- impropriety of injunction considered in fixing punishment, 1418, 1462.
  - proceedings after dissolution, 1462.
- before dissolution, 1462.
- levy by plaintiff in execution, proper remedy attachment, 1463.
- statutory franchise protected by attachment, 1463.
- when party in contempt heard on motion to dissolve, 1464.
- merits of patent right not considered, 1465.
- costs, where violation clear, but service defective, 1465.
  - sufficient punishment when violation not wilful, 1465.
- in Wisconsin, order adjudging guilty, not appealable, 1466.

W.

WARRANTS,

- receipt of, by municipality, not enjoined, 1306.

WARRANTY. (See PURCHASE MONEY.)

WASTE,

- by mortgagor, enjoined though not prayed, 38.
- by tenant, when enjoined, 434.
- of mortgaged premises, injunctions against, 478-483.
- origin and nature of the jurisdiction, 649-670.
  - jurisdiction of recent origin, 649.
    - mode of proceeding at common law, 649.
  - distinction between waste and trespass, 650.
  - injunction pending trial of title at law, 650.
  - general rule for granting relief, 651.
    - complainant's title must be clear, 651.
    - irreparable injury must be shown, 651.
    - facts must be alleged, 651.
  - title must be established at law, 652.
  - in trespass *quare clausum* injunction not retained, 652.
- insolvency of defendants and removal of improvements, 653.

## THE REFERENCES ARE TO THE SECTIONS.

WASTE — *Continued.*

- coupled with adverse possession must be claim of entire title, 654.
- pending ejectment, ordinary agricultural use of land not restrained, 654.
- threats of waste sufficient, 655.
- when waste is past, averment of future injury necessary, 655.
- defendant must have interest or title, 656.
- vendee in possession enjoined, 657.
- when purchaser at judicial sale or attaching creditor may enjoin, 658.
- changing nature of premises by tenant, when enjoined, 659.
- improper tillage interfered with, 660.
- removal of manure enjoined, 660.
- beneficial acts by defendant, no objection to interfering, 660.
- retaining injunction pending writ of error, 661.
- relief allowed when no action at law pending, 662.
- under Wisconsin practice temporary injunction may be prayed *pendente lite*, 662.
- purchaser under decree enjoined, 663.
- tenant restrained from removal of mineral deposits, 663.
- tenant for life not allowed to join with remainder-man to restrain removal of coal, 664.
- insolvency of surety of administrator no ground for injunction, 665.
- when quarrying enjoined, 666.
- diligence required, especially in cases of mines, 667.
- injunction before answer, 668.
- accounting an incident to the injunction, 669.
  - when decreed without injunction, 670.
- destruction of timber, 671-679.
- cutting and removal of timber enjoined, 671.
  - accounting for, decreed, 671.
  - action at law need not be pending, 671.
  - waste need not be actually committed, 672.
  - irreparable injury must be shown, 673.
    - ornamental or useful timber, 673.
    - cutting saplings not enjoined, 673.
  - removal of timber already cut not enjoined, 673.
  - injunction not allowed for past injuries, nor where defendants claim title and possession, 674.
    - illustrations of the relief, 675.
  - cutting timber upon pine lands to injury of inheritance enjoined, 676.



THE REFERENCES ARE TO THE SECTIONS.

WASTE — *Continued.*

- cutting down fruit trees enjoined, 676.
- devisee enjoined pending appeal to determine his rights, 677.
- plaintiffs in ejectment may enjoin, 677.
- when owner not enjoined by lessee of shooting privileges, 678.
- after injunction against defendant, pending ejectment, cutting timber by plaintiff justifies dissolution, 679.
- equitable waste, injunctions concerning, 680-685.
  - definition of, 680.
  - illustrations of, 680.
  - cutting of ornamental timber enjoined, 681.
  - intention of devisor governs in determining what trees are ornamental, 681.
  - trees for protection and to exclude objects from view protected, 681.
  - timber "standing for ornament and shelter," or "contributing to ornament," 682.
  - question of what are ornamental one of fact, 682.
  - when cutting young trees destructive to the estate, relief allowed, 683.
  - where object of action is to secure legal relief injunction refused, 684.
  - trust and contingent estates, 685.
  - relief refused between tenants in common for purely equitable waste, 685.
- parties to the action, 686-696.
  - general rule as to, 686.
  - rights of reversioner or remainder-man against tenant for life or years, 686, 687.
  - removal of mill fixtures enjoined, 687.
  - "without impeachment of waste" excuses only permissive waste, 687.
  - by heir-at-law disputing will, enjoined, 688.
  - devisee for life may be enjoined by owner, 689.
  - landlord not entitled to reversion can not restrain removal of building by tenant, 689.
  - ground landlord may enjoin under-lessee, 689.
  - tenant who exceeds right of estovers may be enjoined, 690.
  - assignee of original lease may enjoin under-lessee, 690.
  - tenants in possession should be made parties, 690.
  - changing of premises enjoined, 691.

## THE REFERENCES ARE TO THE SECTIONS.

WASTE — *Continued.*

- use of premises in violation of covenants enjoined, 691.
- when joint tenants, tenants in common or coparceners enjoined, 692.
- by mortgagor, enjoined, 693.
- principle of the rule, 694.
- mortgagor's insolvency must be alleged, 694.
- rule applies to mortgages of chattels, 695.
- after sale of equity of redemption mortgagee can not enjoin, 696.
- where title held merely as security, relief refused unless impairment of security shown, 696.
- of partnership assets, injunction against, dependent upon application for receiver, 1354.
- when receiver removed, original injunction continued, 1354.
- in matters of lunacy, enjoined on motion, 1566, n.
- admission of affidavits on motion for dissolution, 1603.

## WATER,

- nuisances to, 794-815.
- easements in, 870-885.
- name applied to mineral water protected, 1082.

## WATER COMPANY,

- exclusive franchise of, when protected, 899.
- exclusive contract of, with city, protected, 1183 *a*.
- may enjoin city from interference, 1281 *a*.

## WILL,

- bill to set aside, injunction refused, 51.
- lost, contest between devisee under, and heir, 362.
- waste by heir-at-law disputing, enjoined, 689.

## WITNESSES,

- absence of, as ground for injunction, 79.

## WRIT OF ERROR,

- not enjoined for mistake in bill of exceptions, 47.
- no bar to enjoining judgment, 133.
- pending in cases of waste, when injunction retained, 661.
- does not lie in Wisconsin to review judgment for contempt, 1466.
- from United States Supreme Court, effect of on state courts on appeal, 1699.











